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HILLSIDE FLUOR SPAR MINES,
a corporation,
Appellee,

v.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Hillside Fluor Spar Mines, brought suit against Hartford Accident and Indemnity Company, defendant, on several policies of insurance issued to plaintiff. The cause was tried before the court without a jury on stipulated facts, resulting in a finding and judgment for plaintiff, from which defendant appeals.

The essential facts disclose that plaintiff was engaged in operating a fluor spar mine in Illinois. From 1924 to 1933, inclusive, defendant executed and delivered to plaintiff, annually, its Standard Workmen's Compensation and Employer's Liability Policy. The ten policies issued were each effective for a period of one year, and the terms and provisions of each policy were the same, with the following exceptions: The five policies in force from March 1, 1924, to March 1, 1929, each contained identical indorsements with respect to Illinois Workmen's Compensation coverage; the five policies in force from March 1, 1929, to March 1, 1934, each contained identical Illinois Compensation indorsements, but they were different from the indorsements in the first five policies. The last policy, effective from March 1, 1933, to March 1, 1934, contained an additional indorsement which was not a part of any of the other policies.

Four of plaintiff's employees had made claim against and sued

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plaintiff for damages on account of occupational diseases alleged to have been contracted while working in plaintiff's mines, under terms of employment which began either before or during the period between March 1, 1924, and March 1, 1929. A fifth employee, who likewise filed suit against plaintiff, began his employment shortly after March 1, 1924, and worked for plaintiff until subsequent to March 1, 1933. He claimed that his disability began during the period between March 1, 1929, and March 1, 1933.

Four of the employees filed their suits in the Superior court of Cook county. The fifth brought his action in Hardin county. At the outset of the litigation plaintiff employed its own counsel, who appeared and undertook the defense of each of the cases, and then some weeks later notified the insurance company of the pendency of the suits and demanded that it assume the defense at its own expense, which the insurance company refused to do.

The complaints in the four suits brought in the Superior court of Cook county were practically identical, except as to differences in dates of employment and periods of disability. Each complaint alleged that the atmosphere in the plant where the employee worked was heavily laden with dust and that a constant breathing of this atmosphere tended to cause a disease which became cumulatively so acute as to disable the employee from performing any further work. The occupational disease alleged to have been contracted was fluoricosis or fluorite pneumoconiosis, commonly called "Miner's Consumption." It was also alleged that the occupational disease named came within the contemplation of section 1 of the Illinois Occupational Diseases Act (chap. 48, p. 1375, Cahill's Ill. Rev. Stats. 1933), and afforded an action for damages to plaintiff as contradistinguished to such an occupational disease as was defined in section 2 of the act, which provided compensation payments under the Workmen's Compensation Act in the event of disability from such a disease. It was alleged

plaintiff for damages on account of occupational disease alleged to have been contracted while working in plaintiff's mines, under terms of employment which [illegible] the period between March 1, [illegible], and [illegible], 1931, [illegible] Likewise filed [illegible] after March 1, 1931, [illegible] March 1, 1933. [illegible] obtained [illegible] the period between March 1, [illegible], and [illegible].

[illegible] under [illegible] course of [illegible] employment. [illegible] in [illegible] at the [illegible] who [illegible] and then [illegible] of the [illegible] expense, which [illegible].

The [illegible] court of [illegible] difference in [illegible] employee working [illegible] time since [illegible] to route in [illegible] work. The occupational [illegible] sonic or fluorite [illegible] emphasis." It was [illegible] the occupational disease named came within the contemplation of section 1 of the Miners' Occupational Diseases Act (citing, A. [illegible] p. 1[illegible], [illegible] v. [illegible], 1933), and afforded an action for damages to [illegible] such an occupational disease as was defined in section 2 of the act, which provided compensation payments under the Workmen's Compensation Act in the event of disability from such a disease. It was alleged

in each instance that the disease was contracted because of the negligence and wilful misconduct of the employer in failing to comply with the Occupational Disease statute of this state (secs. 1 et seq., chap. 48, Cahill's Ill. Rev. Stats. 1933). None of the complaints alleged an accidental injury.

The proceeding filed in Hardin county was ultimately disposed of on pleadings, and an appeal prosecuted to the Supreme court, which in due course held that sec. 1 of the Occupational Disease Act was not constitutional and that the employee could not recover under that section for an occupational disease. (Sullivant v. Hillside Fluor Spar Mines, 360 Ill. 607.) Upon the filing of the opinion in the foregoing case the parties by stipulation dismissed the causes then pending in the superior court. The Hillside Fluor Spar Mines having prevailed in these five litigated matters claimed and sued defendant herein for legal and other expenses incurred in successfully conducting the defense in the aggregate sum of $12,762.35. Its suit is for damages for a claimed breach by the insurance company of its undertakings set forth in clause three of the policy, in refusing to defend the actions for damages growing out of occupational diseases, and the sole question here presented for determination is whether the policies and indorsements required defendant to conduct the defense under par. 3 of the policy. By said par. 3 of the policy the insurance company undertook to defend suits and proceedings "on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor even though the suits are groundless." In Brodek v. Indemnity Insurance Company of North America, 292 Ill. App. 363, wherein leave to appeal to the Supreme court of Illinois was denied, we had under consideration a policy identical with the ones here under consideration, and after reviewing the cases in this and other states we disposed of various contentions made in that proceeding as well as in the case at bar.

in each instance that the disease was contracted was one of the negligence and willful misconduct of the employer in failing to comply with the [illegible] I et seq., [illegible] complaint. [illegible]

The [illegible] of on [illegible] in the [illegible] not [illegible] section for [illegible] Mines, [illegible] for [illegible] penalty in the [illegible] prevailed in [illegible] herein for [illegible] in for [illegible] to defend the actions for [illegible] and the sole question here presented [illegible] policies are [illegible] under par. 3 of the [illegible] same company underbook [illegible] of such injuries, including [illegible] injuries and demanding [illegible] the suits are groundless." In [illegible] of North America, 292 Ill. [illegible] Supreme court of Illinois [illegible] policy identical with the one here under consideration, and after reviewing the cases in this and other states we disposed of various contentions made in that proceeding as well as in the case at bar.

We held that under par. 1 (b) of the policy, which was the indemnifying clause with reference to judgments for damages, there is no coverage on account of an occupational disease, because par. 7 of the policy defines "personal injuries" and "such injuries" as accidental injuries, and an occupational disease is not an accidental injury. In so holding we approved the decision and reasoning in Belleville Enameling & Stamping Co. v. United States Casualty Co., 266 Ill. App. 586, decided by the appellate court in another district in this state, wherein leave to appeal was afterward denied by the Supreme court. We also held that par. 1 (a) of the policy, which provides for Workmen's Compensation payments, relates solely to compensation recoverable under the Workmen's Compensation Act, and does not provide coverage for damages recoverable in an action at law; that the bringing of a suit was not merely a procedural matter, but jurisdictional, since the jurisdictional requirement for a claim for compensation is that it be filed before the Industrial Commission of the state, whether the claim is under the Workmen's Compensation Act or under the Compensation Act because of Occupational Diseases, and that since no claim for compensation had been made there could be no coverage under this paragraph to pay a judgment in a law suit, even though the theory of the employee might be that he was entitled to recover compensation in a law action. In this connection it was also held that the filing of a suit at law for damages under a section of the Occupational Disease Act was not tantamount to making a claim under the Workmen's Compensation Act, but was rather a disavowal of any and all rights for compensation under either statute. We also held that the question whether or not a given suit for damages is covered under par. 1 (b) of the policy is to be determined from the declaration or complaint filed in that suit, and if that declaration does not show a cause that is covered by the policy, then there is no duty to pay a judgment in connection with it; also that paragraphs

We held that under par. 1 (b) of the policy, which [illegible] the indemnifying clause with respect [illegible], there is no coverage on account of an injury [illegible] unless par. 1 (b) of the policy defines [illegible] injuries [illegible] accidental injuries, and [illegible] accidental injury. [illegible] Hollywood Productions [illegible] 250 Ill. App. 526, decided by the [illegible] [illegible] purpose [illegible] protection for [illegible] compensation [illegible] does not [illegible] [illegible] the intentional, also the [illegible] for [illegible] of the [illegible] or under the [illegible] and that since [illegible] be no coverage [illegible] even though the [illegible] to recover compensation [illegible] also held that the [illegible] of the Occupational [illegible] under the workmen's [illegible] any and all [illegible] for compensation [illegible] also held that the question [illegible] or not [illegible] is covered under par. 1 (b) of the policy is to be not limited from the declaration or complaint filed in that [illegible] and if that declaration does not show a cause that is covered by the policy, then there is no duty to pay a judgment in connection with it; also that paragraph

3 and 4 of the policy, which relate to defenses of suits and payments of all costs in connection therewith, are not broader than the undertaking in par. 1 (a) and 1 (b), and therefore do not require the defense of any suit or claim for which there could be no coverage under the policy in the event that a judgment might be secured or claim allowed. Some or all of these contentions are made in the instant proceeding, and the views of this court are amply set forth in the Brodek case.

More recently some of the same questions arose in W. E. Salomon Co. v. Globe Indemnity Co., General No. 40089 (not published) opinion filed February 14, 1939, where under a policy known as Standard Workmen's Compensation and Employer's Liability policy, which was identical in form with the policy in the Brodek case and those here under consideration, one Steven Kravarik claimed injuries resulting from an occupational disease incurred during the course of his employment. Plaintiff in that proceeding notified the insurance company which replied that occupational diseases were not covered by the policy, and Kravarik thereupon brought suit. The insurance company having refused to defend plaintiff hired its own counsel who effected a settlement, and the demand of the plaintiff having been refused by the insurance company suit was instituted. The sole question there presented was whether pars. 1 (b) and 7 of the policy could be so construed as to afford indemnity to plaintiff for an occupational disease incurred by one of its employees in the course of his employment, and the controversy centered around the provisions of the policy which are identical with those in the case at bar. Plaintiff's contention in that suit was that under the provisions of par. 1 (b) personal injuries include those incurred through occupational diseases, and that par. 7 should be read as referring to "occurrences" and "incidents" rather than "accidents", as provided in the policy. We held, however, that under the authority

3 and 4 of the policy, which relate to defense of suits and payments of all costs in connection therewith, are not broader than the undertaking in para. 3 (a) and 3 (b), we therefore do not require the defense [illegible] for which there could be no coverage under the policy in [illegible] might be secured or claim filed. [illegible] made in the future proceedings [illegible] simply [illegible].

More troublesome [illegible] Judgment Dec. 1. Here insured [illegible] (underlined) operated [illegible] insured, [illegible] standard [illegible] which are [illegible] there have [illegible] territorial [illegible] of his employees. [illegible] insurance company which [illegible] covered by the policy, [illegible] insured [illegible] counsel who [illegible] having been [illegible]. The role question there [illegible] the policy could be [illegible] for an occupational disease [illegible] source of his employees, [illegible] provisions of the policy which [illegible] at bar. Plaintiff's contention in [illegible] provisions of par. 1 (b) personal injuries including those incurred through occupational diseases, and that par. 7 should be read as referring to "occurrences" and "incidents" rather than "accidents", as provided in the policy. We held, however, that under the authority

of the Belleville and Brodek cases, in both of which leave to appeal to the Supreme Court of Illinois had been denied, no recovery could be had. Although we are not unmindful of the fact that other states have held to the contrary, the decisions in Illinois, with one exception, are all adverse to plaintiff's contention, and hold that this form of policy covers only personal injuries resulting from an accident, and that since the injury complained of is not the result of an accident, but rather an occupational disease, plaintiff is not entitled to recover.

Counsel for plaintiff relies chiefly on Heineman Corp. v. Standard Surety & Casualty Co., 289 Ill. App. 358, which was decided in another branch of this court before the opinion in the Brodek case was filed. That suit was likewise predicated upon a policy containing provisions identical with those in the Brodek and Belleville cases, and in the proceedings at bar. There the employee instituted against her employer two proceedings, a suit in the superior court and another before the Industrial Commission. In the superior court she alleged that in the course of her work her hands came in contact with certain substances which macerated the skin of her hands and body; that she was caused to come in contact with various drugs and substances in harmful quantities and under harmful conditions; and that by reason of her exposure to the silks and drugs used in the manufacture of silk, she was poisoned. On the claim filed before the Industrial Commission an award was made to her. The insurance company did not defend the proceedings before the commission. Therefore, one of the distinguishing points between the Heineman case and the Brodek and Belleville cases is that in the former an adjudication was made by the Commission that the injuries were compensable and that the plaintiff there had sustained an accidental injury. Consequently the award in the Heineman case was res adjudicata and constituted an estoppel against the insurance company to contend

of the Bellaville and Brodak cases, in both of which leave to appeal to the supreme court of Illinois had been denied, no recovery could be had. [illegible] of the fact that other states have held to the contrary, [illegible] in Illinois, with one [illegible] contention, [illegible] injury [illegible] complained of [illegible] occupational [illegible].

[illegible] in [illegible] was filed. [illegible] case, [illegible] the [illegible] there [illegible] the [illegible] by reason of [illegible] time of [illegible] Industrial Commission [illegible] company did not [illegible] Therefore, one of the [illegible] case and the Brodak and Bellaville cases [illegible] the former an adjudication was made by the Commission that the injuries were compensable and that the plaintiff [illegible] accidental injury. Consequently the award in the Heinemann case was res adjudicata and constituted an estoppel against the insurance company to contend

otherwise. Moreover, as pointed out in our opinion in the Brodek case, the Heineman case is readily distinguishable from the Brodek case, by reason of the fact, which does not appear in the opinion but is set forth clearly in the record, that the indorsements on the policy in the Heineman case specifically covered the liability of the insured under the Workmen's Compensation Act and also under both sections 1 and 2 of the Occupational Diseases Act, whereas in the Brodek proceeding the policy expressly limited the coverage to the liability of the assured under the Compensation Act.

This leads to the only other consideration urged in this proceeding not covered in any of the former decisions, namely, whether the indorsements on these policies in anywise affect the liability of defendant as set forth in the conclusions heretofore reached. By Par. 1 (a) of the policy, defendant agreed "to pay promptly to any person entitled thereto under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof, as they become due, (1) to such person because of the obligation for compensation for any such injury imposed upon or accepted by this employer under such of certain statutes, as may be applicable thereto, citing and described in an indorsement attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law." The indorsement referred to in this paragraph and attached to the policies covering the second five-year policy period, provides "The obligation of paragraph 1 (a) of the policy to which this indorsement is attached, includes such Workmen's Compensation Laws as are herein cited and described, and none other," and enumerates the various House and Senate bills passed by the legislature of this state, constituting the present Workmen's Compensation Act, including also House Bill 250, session of 1911 as amended by House Bill 786, session of 1921, and House Bill 228,

otherwise. Moreover, as points out in our opinion in the Brodek case, the Heinemann case is readily distinguishable from the Brodek case, by reason of the fact, which does not [illegible] in the opinion but is not [illegible] [illegible] the Brodek [illegible] on the policy in the Heinemann case [illegible] covered the liability of the insured under [illegible] under both sections 1 and 2 of the [illegible], unless in the Brodek proceeding [illegible] covered to the liability of [illegible].

This leads us to the [illegible] the [illegible] proceeding not covered [illegible] whether the [illegible] liability o[illegible] reason. By [illegible] of the [illegible] prompt [illegible] compensation [illegible] amount of any [illegible] become due, (1) to [illegible] compensation [illegible] employer under such [illegible] to, etching and description in an instrument [illegible] each of which [illegible] compensation [illegible] and attached to the [illegible] period, provides "[illegible] to which this indorsement is attached," [illegible] Compensation Laws as are herein cited [illegible] other," and enumerates the various laws and [illegible] passed by the legislature of this state, constituting the present workmen's Compensation Act, including also House Bill 250, session of 1911 as amended by House Bill 786, session of 1913, and House Bill 228,

session of 1923, being known as the Occupational Diseases Law." By sec. 15 of the Occupational Diseases Law of 1923 it was provided that if an employee was disabled by an occupational disease arising out of and in the course of his employment in one or more of the occupations referred to in sec. 2 of the Act, he would be entitled to compensation in the same manner and subject to the same terms and conditions as are provided for in the Workmen's Compensation Act for accidental injuries, and "for this purpose" the disability, by reason of an occupational disease arising out of the course of employment in one or more of the occupations referred to in sec. 2 of the Act, shall be treated as the happening of an accidental injury. The Occupational Diseases Law, however, made no such provision with reference to disability caused by such occupational diseases as were named in sec. 1 of the Act, but for those injuries the employee was left to whatever rights he might have under the common law, and such has been the construction of the Occupational Diseases statute by our Supreme Court. (First National Bank v. Wedron Silica Co., 351 Ill. 560.) It is therefore clear that the purpose of the indorsements was simply to cover such compensation payments as were required by the Workmen's Compensation Act and the Occupational Disease statute. The indorsement does not, however, refer to, extend or enlarge the undertakings of par. 1 (b) of the policy to indemnify against loss by reason of liability imposed on the insured by law for damages, and if there had been a judgment against defendant for damages on account of occupational disease, there would have been no obligation under the policy and the indorsement to indemnify plaintiff, in the view that we take. Neither does the indorsement, in our opinion, enlarge or extend par. 3 of the policy which contains the undertaking "to defend any suits or other proceedings on account of such injuries ***, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent," so far as damage suits are

[illegible]

concerned. Under the policy and the indorsements defendant would be obligated to defend any action of an employee claiming compensation for disability on account of an occupational disease specified in sec. 2 of the Occupational Disease Act, but no obligation is imposed on the insurance company to defend an action for damages, as distinguished from compensation under the Workmen's Compensation Act, for an occupational disease defined and included in sec. 1 of the Occupational Disease statute. The suit at bar makes no claim for compensation, but recovery is merely sought for damages on account of occupational diseases not included in sec. 2 at all, but are specifically averred to be included in sec. 1 of the Act. For these reasons we are impelled to hold that the indorsements attached to the policies in question did not impose on defendant the obligation to defend these suits, and do not alter the conclusions reached in our previous holdings.

In view of these considerations, we hold that defendant should not be held in damages for the expenses growing out of the defense of the suits in question, and therefore the judgment of the circuit court should be reversed. It is so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

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Please cite

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MARY GORMAN and JOSEPH MORPER,
Appellees,

v.

W. PISZYNSKI, doing business as
LINCOLN BAKING COMPANY, and
M. SEWINSKI,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

301 I.A. 597

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Mary Gorman and Joseph Morper, plaintiffs, brought suit against W. Piszynski, doing business as Lincoln Baking Company, and M. Sewinski, defendants, for damages to Morper's automobile and for injuries sustained by Mary Gorman, as the result of a collision between Morper's automobile and a truck owned by Piszynski and driven by Sewinski, on the morning of December 5, 1936. The jury returned a verdict against both defendants and in favor of Mary Gorman for $1,500 and for Morper in the sum of $101.50. Defendants appeal from the judgment entered on the verdict.

At the time of the accident Morper was employed by the Chicago Park District. December 5, 1936, at about 6:10 a.m. Morper was driving a Ford V-8 automobile in a southerly direction on Western avenue. Mary Gorman was a passenger in the car, sitting beside Morper in the front seat. The accident occurred at dawn. Plaintiffs' headlights were burning, and defendants' truck had a red light burning in the rear.

The collision occurred about 100 feet south of 57th street on Western avenue, an 85 foot concrete highway in the City of Chicago. Morper had followed defendants' truck for a considerable distance, and according to the evidence adduced by plaintiffs he was

MARY GORMAN (Mrs. [illegible]),
Appellee,

v.

[illegible],
MARTHA MARKS [illegible], and
M. DE LYNGE,

[illegible]

Mary Gorman and [illegible] filed a [illegible] against [illegible], [illegible], and M. [illegible], [illegible] collision [illegible] Mrs. [illegible] Hearing [illegible] 1936. The jury returned a verdict [illegible] in favor of Mary Gorman for [illegible] "ICI.BO" [illegible] verdict.

At the time of the [illegible] Chicago [illegible] Morper was driving a [illegible] on Western avenue. Mary Gorman [illegible] beside Morper in the front seat. [illegible] Plaintiffs' headlights were burning, and [illegible] had a red light burning in the rear.

The collision occurred about [illegible] north of 87th street on Western avenue, an 85 foot concrete driveway in the city of Chicago. Morper had followed defendants' truck for a considerable distance, and according to the evidence adduced by plaintiffs he was

proceeding about 50 feet to the rear of defendants' truck at the rate of approximately 25 miles an hour. Sewinski, who was driving Piszynski's truck, was making deliveries of bakery goods in the usual course of his business. One of his customers was located on Western avenue just south of 57th street, and as Sewinski approached the customer's shop or store he observed that it was still closed, and evidently determined to make other deliveries and return to this particular store later. At a point about 100 feet south of 57th street, Sewinski, without giving any signal or warning of his intention, made a sudden and abrupt lefthand "U" turn in front of plaintiffs' automobile in an attempt to go north on Western avenue. Morper, who was driving in the lane to the left of defendants' truck, immediately put on his brakes and turned to the right so as to try to avert a collision, and simultaneously honked his horn. Notwithstanding his efforts, the Ford car hit the rear of the truck in back of the left rear wheel and tipped it over on the pavement. Morper's car was brought to a standstill within six or eight feet after the impact. Defendants' truck was only slightly damaged, and the damages to Morper's car amounted to $101.50. Mary Gorman, however, was thrown against the windshield of the car in which she was riding with such force that the glass was broken and she was rendered unconscious and severely injured.

As ground for reversal it is urged that the court erred in not directing a verdict for defendants as to both plaintiffs, that the verdicts are against the manifest weight of the evidence; that the court erred in giving certain instructions tendered by plaintiffs; and that a new trial should have been granted on the basis of affidavits presented with defendants' motion for a new trial.

The only occurrence witness for defendants was Sewinski, the driver of the truck. He testified that plaintiffs' car was traveling at 55 to 60 miles an hour, and that Morper "must have

proceeding about 5 feet to the rear of defendants' truck at the rate of approximately [illegible] an hour. Swanwick, who was driving Plaxymakis's truck, [illegible] of backing road in the usual course of his business. [illegible] on Eastern avenue just north of [illegible] the customer's shop [illegible] evidently [illegible] parties [illegible] street, [illegible] tiff's truck in backing to [illegible] corner where [illegible] suddenly put on his brakes and [illegible] a collision, and [illegible] the truck. [illegible] his chauffeur, who [illegible] left rear fender [illegible] was brought to a [illegible] impact. [illegible] to support a [illegible] against the individual [illegible] such force that the [illegible] and severely injured.

As ground for a [illegible] in not directing a verdict [illegible] the verdicts are against the [illegible] the court erred in [illegible] tiff; and that a new trial should have been [illegible] of affidavits presented with defendants' motion for a new trial.

The only occurrence witness for defendants was Swanwick, the driver of the truck. He testified that plaintiffs' car was travelling at 55 to 60 miles an hour, and that Lorpor "must have

lost control, or something," because instead of coming straight south his car was going southeast toward the truck. Morper and Mary Gorman denied they were traveling at an excessive rate of speed, and testified that they had followed Sewinski along Western avenue for a considerable distance, approximately 50 feet to the rear, and that they were not going over 25 miles an hour. The fact that Morper's car was brought to a standstill within six or eight feet after the impact, and that his car was only slightly damaged, tends to corroborate the testimony of these two witnesses. Defendants argue that at 25 miles an hour Morper could have brought his car to a standstill within 20 or 25 feet, and they seek to rebut the effect of plaintiffs' testimony by asserting that Morper must have been driving at a much greater rate of speed and that he was negligent in swerving to the southeast rather than proceeding straight ahead. The record is voluminous and the evidence was conflicting, but it was within the province of the jury to determine from the circumstances whether defendants were negligent as charged in the complaint and also whether Morper was in the exercise of due care and caution for his own safety. Both of these issues were resolved against defendants, and unless some reversible error occurred in the trial of the cause we would not be justified in setting aside the verdicts and judgment on the ground that they were against the manifest weight of the evidence. So far as Mary Gorman is concerned, she was an invited guest and a passenger in plaintiffs' car. She had no control over the operation of the automobile and there is no evidence to indicate that she was in anywise negligent. Therefore, even though it could be said that Morper was negligent, his negligence cannot be imputed to her.

Criticism is made of instructions 4, 5, 6, 7, 8 and 9, tendered by plaintiffs and given by the court. In the first of these, the court charged the jury that if a person without fault is confronted with sudden danger, his duty to exercise ordinary

lost control, or something," because instead of coming straight south his car was going [illegible] the tracks. Harper and Mary Gorman denied they were [illegible] excessive rate of speed, and testified [illegible] eastern avenue for a considerable distance, [illegible] fact to the rear, and that they [illegible] fact that Harper's car [illegible] six or eight feet [illegible] damaged, [illegible] defendant [illegible] his car [illegible] the effect of [illegible] have be driving [illegible] negligent in [illegible] ahead. The record in [illegible] but it was [illegible] questionable whether [illegible] plaintiff [illegible] contain [illegible] against defendants, and [illegible] trial of [illegible] verdicts and [illegible] manifest weight of [illegible] she was an invited [illegible] no control over the operation of [illegible] dence to indicate that [illegible] even though it could be said that Harper [illegible] gence cannot be imputed to her.

Criticism is made of instructions [illegible] and 9, tendered by plaintiffs and given by the court. In the first of these, the court charged the jury that if a person without fault is confronted with sudden danger, his duty to exercise ordinary

care does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances. The evidence warranted such an instruction. Defendant, Sewinski, made a "U" turn in the path of Morper's car, without any warning, and by reason thereof Morper was confronted with a sudden danger, and the charge to the jury was in accordance with settled principles of law applicable to situations of that kind. The identical instruction was approved in Union Traction Co. v. Newmiller, 215 Ill. 383, 387, and in Jensen v. East St. Louis Ry. Co., 202 Ill. App. 583, 591.

Instruction No. 6 advised the jury that there was an ordinance of the City of Chicago in full force and effect at the time of the collision which prohibited the operator of any vehicle to turn the same so as to proceed in the opposite direction, unless such movement can be made in safety and without interfering with other traffic. It is argued that defendants were not charged in the complaint with a violation of this ordinance. It appears, however, that the complaint does charge the defendants with having negligently made a "U" turn "without a proper outlook" and "without any warning." A similar situation arose in Star Brewery Co. v. Hauck, 222 Ill. 348, where it was contended that the speed ordinance was not admissible under the pleadings. The court said, however, that the declaration charged careless and negligent driving, and since there was evidence to support the charge, the conditions presented by the evidence were sufficient to make the ordinance admissible. A similar objection is made to instruction 5, which deals with an ordinance providing that the operator of a vehicle shall not suddenly start, slow down, stop or attempt to turn without first giving a suitable signal. What we have said of instruction No. 6 is likewise applicable to this instruction.

Instruction No. 7 charged the jury as follows: "If the Jury find from the evidence that the defendant drove its truck in front of

case does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances. The evidence warranted [illegible] defendant, Sowinski, made a "U" turn in [illegible] without any warning, and by reason [illegible] on danger, and the giving [illegible] of law applicable [illegible] in-structions [illegible] 222 III. 528, 529.

Instruction No. [illegible] that [illegible] negligence of the driver of [illegible] of the [illegible] turn the same to [illegible] such movement [illegible] other traffic. [illegible] the complaint [illegible] even, [illegible] gently made a "U" [illegible] warning." A similar [illegible] 222 III. 528, [illegible] admissible under [illegible] declaration of [illegible] was evidence to [illegible] evidence were [illegible] objection is made to instruction [illegible] providing that the operator of [illegible] slow down, stop or attempt to turn [illegible] signal. That we have said of instruction No. 6 is likewise applicable to this instruction.

Instruction No. 7 charged the jury as follows: "If the jury find from the evidence that the defendant drove its truck in front of

the automobile operated by the plaintiff, Joseph Morper, and that such conduct in so driving its truck was negligence on the part of the defendant, and that said negligence, if any, was the proximate cause of the collision, and if you further find the plaintiffs were in the exercise of ordinary care and caution for their own safety, then you are instructed that your verdict must be for the plaintiffs." This precise instruction was approved in Williams v. Louis, 204 Ill. App. 62, and in McCarthy Illinois Instructions to Juries, (1932), sec. 236, p. 93.

In instruction No. 8 the court charged the jury that if it believed from a preponderance of the evidence that "at and immediately prior to the accident in question, the plaintiffs were in the exercise of reasonable care and caution for their own safety, and that the accident, if any, was proximately caused by careless and negligent acts of the defendant, then it would be your duty to find the defendants guilty." This instruction conformed to the evidence and could not have misled the jury. An instruction which is practically word for word with this instruction was approved in Wagner v. Coers, 262 Ill. App. 667.

The last instruction of which defendants complain is No. 9, which reads: "The court instructs the jury that if you find from a preponderance of the evidence that the plaintiff, Mary Gorman, was injured by reason of the negligence of the defendants, as alleged in the complaint, and that at and before the time of the collision, the plaintiff was in the exercise of ordinary care and caution for her own safety, and that the plaintiff sustained injuries, if any, while she was riding in the automobile in question as a passenger, then even though the driver of said automobile was guilty of some want of care which contributed in some measure toward bringing about the accident in question, such want of care, if any, on the part of the driver of said automobile cannot be imputed to the plaintiff, Mary Gorman." It has frequently been held that it is not error to give an

the automobile operated by the plaintiff, Joseph Horper, and that such conduct in so driving it, if such was negligence on the part of the defendant, and [illegible] would [illegible], if any, was the proximate cause of the collision. [illegible] and the plaintiffs were in the exercise of [illegible] then you are instructed [illegible] be for the plaintiffs." [illegible] Lowing, 204 Ill. [illegible] (1922), see. 276, p. 38.

In [illegible] it believed from [illegible] prior to [illegible] of [illegible] accident, [illegible] rate of [illegible] safe driving. [illegible] not have [illegible] for word with this instruction [illegible] Horper v. [illegible], 188 Ill. App. 627.

The last instruction [illegible] which reads: "The court instructs the jury [illegible] from a preponderance of the [illegible] injured by reason of the negligence of the defendant, as alleged in the complaint, and that [illegible] of contributory negligence, the plaintiff was in the exercise [illegible] for her own safety, and that the plaintiff [illegible] injuries, if any, while she was riding in the automobile in question as a passenger, then even though the driver of said automobile was guilty of some want of care which contributed in some measure towards bringing about the accident in question, such want of care, if any, on the part of the driver of said automobile cannot be imputed to the plaintiff, Mary Gorman." It has frequently been held that it is not error to give an

instruction of this kind where the evidence in the case warrants such a charge. In Elliott v. Atchison, Topeka & Santa Fe Ry. Co., 262 Ill. App. 466, an instruction similar to instruction No. 9 was approved, and like instructions were discussed and approved in Moore v. Jansen & Schaefer, 265 Ill. App. 459, Arndt v. Riverview Park Co., 259 Ill. App. 210, and Perryman v. Chicago City Ry. Co., 242 Ill. 269.

We have discussed these instructions in some detail because defendants have devoted considerable space in their brief to the argument that they were erroneously given. It should be pointed out, however, that no objection was made to any of the instructions upon the hearing, and defendants now for the first time on appeal assign error on the ground that the jury was improperly charged. Under the amendment of 1937 to section 67 of the Civil Practice Act (chap. 110, Ill. Rev. Stats. 1937) the General Assembly deleted the provision of the section regulating the time to take exceptions to the giving or refusing of instructions to "any time before the entry of judgment in the case." Defendants, having failed to make timely objections to the instructions complained of, are, under the provisions of the statute, precluded from raising the objections on appeal.

The remaining ground urged for reversal is that the court should have granted defendants a new trial on the basis of the affidavits presented with their motion. These affidavits sought to explain the absence of two police officers not available to subpoena when the case was heard. One of the officers had been in the city for some time before the trial, but left on a furlough shortly before the hearing and could not be produced. The testimony of both of these officers had to do principally with the speed of Morper's car. Defendants' affidavits set forth what these officers were to testify to with reference to this phase of the case. No request was made, however, for a continuance, and the circumstance of their absence was

instruction of this kind where the evidence in the case warrants such a charge. In Allen v. Jackson, Topeka & Sant. Fe Ry. Co., 262 Ill. App. 400, an instruction [illegible] instruction to. 9 was approved, and like instructions [illegible] approved in Moore v. Jackson & [illegible], [illegible] Kirk v. Riverview Park Co., 256 Ill. [illegible], [illegible] v. [illegible] Ry. Co., 242 Ill. 589.

[illegible] have [illegible] it becomes [illegible] argument [illegible] however, [illegible] the [illegible] error on the [illegible] the [illegible] Ill. 70. [illegible] the section [illegible] relating [illegible] in the [illegible] to the [illegible] institute, [illegible]

The [illegible] should [illegible] affidavits [illegible] to explain [illegible] when the [illegible] for some time [illegible] before the hearing and [illegible] of these officers had [illegible] company's car. Defendants' affidavits set forth that these officers were in testify to with reference to this phase of the case. No argument was made, however, for a continuance, and the circumstance of their absence was

first called to the court's attention upon the argument of a motion for a new trial. Having voluntarily rested their case and not having asked for a continuance or a mistrial, defendants were not entitled to a new trial on the ground that they failed to produce a witness who would in no event do more than to corroborate the testimony of one of the defendants' witnesses at the trial. Neither of these officers was an occurrence witness, and we think the court did not abuse its discretion in overruling the motion.

After a careful examination of the record and points urged for reversal, we have reached the conclusion that the verdicts fairly represent the liabilities of the two defendants. No complaint is made as to the amount of the verdicts. We think the cause was fairly tried and therefore the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

first called to the court's attention upon the argument of a motion for a new trial. [illegible] that the case and not having asked for [illegible] were not entitled to [illegible] to produce witnesses who would [illegible] the testimony of one of the [illegible] either of these [illegible] did not [illegible]

[illegible] for review, [illegible] fairly [illegible] made [illegible] indicate. [illegible] fairly tried [illegible]

[illegible]

38837

PARAGON PRESS, a corporation,
Appellee,

v.

WILSON & CO., INC., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

301 I. A. 398

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action by plaintiff, Paragon Press, a corporation, against Wilson & Co., Inc., a corporation, defendant, for breach of an alleged contract under the terms of which it is claimed that defendant agreed to pay plaintiff $6,939 for printing 50,000 copies of a booklet. Judgment was entered against defendant for $5,415.13 upon a verdict of a jury. This appeal followed.

Plaintiff's amended statement of claim contains four counts, the first of which alleges, in substance, that on April 28, 1931, plaintiff and defendant entered into a contract whereby the former undertook to print for the latter 50,000 copies of a booklet entitled, "When You Entertain," at an agreed price of $6,939, and that pursuant to the contract plaintiff printed said 50,000 booklets in a workmanlike manner and delivered to defendant, as a first instalment, approximately 250 fully bound and completed copies of the same, but that defendant wrongfully "refused to accept said booklets and refused to permit plaintiff to deliver any more of said booklets in completion of its said contract and refused and still refuses to pay plaintiff the agreed price of said booklets."

Count two contains the same allegations as count one, and further allegations that as part of the aforesaid contract defendant

issued an order and an additional order to McQuinn & Company, which are set forth in haec verba and are as follows:

"Date 2-12-31 Order No. A O 55

"Please furnish for our account, per order given C. McQuinn

	Price
"50,000 Booklets (72 pages) WHEN YOU ENTERTAIN complete, including fee for writing, photographs and art, rental of accessories for set ups, typography of 72 pages, original engravings, printing electrotypes; printing, including stock and binding, and agency commissions.	$8,954.85"

"Date 5-15-31 Order No. A O 55A

"Please furnish for our account, per order given

	Price
"Additional charges on booklet WHEN YOU ENTERTAIN, according to tabulated cost sheet	3,091.13
"Plus the loss of sale of the original English finish body stock, approximately	100.00
"50,000 Letterheads and 50,000 reply cards, plus commission	545.10"

Count three alleges that on April 28, 1931, defendant bargained for and bought from plaintiff, and the latter sold to defendant at its request, 50,000 booklets entitled, "When You Entertain," at the price of $6,939, which defendant agreed to pay on delivery, and that although plaintiff was "ready and willing and tendered and offered to deliver the said 50,000 booklets to defendant," the latter refused to accept delivery thereof and to pay for same.

Count four contains allegations similar to count three except that instead of alleging that defendant agreed to pay a specific price for the booklets, it avers that defendant agreed to pay "the fair, reasonable and customary price for such work."

Defendant's affidavit of defense denies specifically the allegations of each count of plaintiff's statement of claim except the allegations contained in count two as to the two written orders given by defendant to McQuinn & Company. As to the two orders, defendant admits giving them, but denies that they constituted

issued an order [illegible]

which was [illegible] base [illegible]

"Note 9-1-51

"Please [illegible]

contracts or parts of contracts with plaintiff.

Defendant contends that "the written contract, as amended, between the defendant and McQuinn & Co., and the execution of the work by the latter without being subject to the orders of the defendant in respect to the details of the work, constituted McQuinn & Co. an independent contractor and not an agent of the defendant; and that the plaintiff has not shown that McQuinn & Co. was the agent of defendant with authority to enter into any contract on behalf of the defendant."

Plaintiff's theory is "that on or about, to-wit, April 28, 1931, it entered into an oral contract with the defendant to print this booklet at an agreed price of $6,939; that this contract was made specifically with Carl McQuinn as the duly authorized agent of Wilson & Co.; that plaintiff performed its contract, made such a tender as the law requires, ceased to perform when ordered to do so by the defendant, salvaged as much as possible, and then sued the defendant for the contract price, less the amount of salvage shown by the evidence; that there was not a written contract in regards to the compilation of this book between Wilson and Co. and McQuinn & Co. or Carl McQuinn."

Defendant contends that the two written orders set up in count two of plaintiff's amended statement of claim constituted a written contract between McQuinn & Company and defendant; that the fact that McQuinn & Company did not sign the contract is immaterial; that the said written contract is clear and unambiguous in its terms and that the relationship between McQuinn & Company and defendant should have been determined by the trial court, as a matter of law; that that court should have held that under the terms of the said contract McQuinn & Company was, in its relationship to defendant, an independent contractor, and that it was error to permit the case to go to the jury. Plaintiff argues that McQuinn & Company did not

contracts or work or [illegible] Lakeside.

[illegible] as amended, between [illegible] of the work by [illegible] of the defendant [illegible] Lakeside [illegible] and [illegible] of [illegible]

[illegible]

[illegible] the term [illegible] defendant should [illegible] of law that [illegible] of the said contract [illegible] an independent contractor, and that it was not [illegible] the same to be to the jury. Plaintiff argues that the [illegible] Company did not

enter into a written contract with defendant to get out the book in question; that the two orders, in the light of the testimony, were merely authority to McQuinn & Company to proceed with the work in accordance with the oral employment of that company by the defendant; that the two orders do not specify the size of the book, the kind of paper or the kind of type to be used, the contents of the book, the character of binding or any particulars which would enable anyone, from the written instrument itself, to supply a completed book;" that if, as defendant contends, these orders constituted a written contract between defendant and McQuinn & Company, there are no specifications set forth therein that would enable defendant to raise any objection to any book that McQuinn & Company might tender, as the alleged contract calls only for 50,000 booklets of 72 pages; that "the instruments are not in the ordinary form of a written contract, but are, on their face, purely unilateral," and that the two orders were never signed by McQuinn & Company. Plaintiff further contends that from the nature of the two orders and the oral testimony bearing upon the question of the relationship between defendant and McQuinn & Company, no other conclusion can be reached than that the contract between them was partly in writing and partly oral, and, therefore, under the law, was an oral contract. We note that the order of February 12, 1931, contains the following language: "Please furnish for our account, per order given C. McQuinn." McQuinn testified at length as to the nature of the oral order given him. After a careful consideration of the two orders and the oral testimony bearing upon the relationship between defendant and McQuinn & Company we are satisfied that the trial court would not have been justified in determining the relationship of the said parties solely by the terms of the two orders. That plaintiff introduced some oral evidence that tended to prove that McQuinn & Company, in its relationship to defendant, was not an independent contractor cannot be seriously questioned.

under Line a written [illegible] to give out the book in question. [illegible] the [illegible] were merely [illegible] & Company [illegible] same with the oral [illegible] that the [illegible] lake or [illegible] the other [illegible]

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for our [illegible] length of [illegible] considerations [illegible] the relationship [illegible] tied that the [illegible] the relationship of the two orders. Two physical instances were [illegible] to prove that McAuley & Company, in its relationship, a [illegible], was not an independent contractor cannot be seriously questioned.

In our opinion the most important contention raised by defendant is that "plaintiff failed to prove that McQuinn & Co., in entering into the contract with plaintiff, was the agent of the defendant with authority to execute the same and obligate the defendant thereon," and that the trial court erred in allowing the case to go to the jury. This contention raises a very serious question, and in our consideration of it we have studied with great care all of the evidence that bears upon it. Defendant concedes that there is some evidence to sustain plaintiff's position that McQuinn & Company was acting as an agent of defendant in the dealings with plaintiff, but it contends that there is no competent evidence tending to prove such agency. It insists that the trial court, over its objections, erroneously admitted a great deal of incompetent evidence offered by plaintiff and that this evidence should be disregarded by us in determining the question as to the alleged agency. That the trial court admitted considerable incompetent testimony is plain, but we do not agree with defendant's contention that there is no competent evidence tending to prove the alleged agency.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant [plaintiff]. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 238 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill.

App. 104, 110; Welever v. Curtiss Candy Co., 293 Ill. App. 586, 587.)

Following the above rule, we conclude that plaintiff made out, by competent evidence, a prima facie case as to the alleged agency and that the trial court did not err in refusing to direct a verdict for defendant. We are convinced, however, that plaintiff failed to sustain the burden of proof as to the alleged agency and that the verdict of the jury upon that question is against the manifest weight of the evidence. Reluctant as we are to disturb the verdict of a jury upon any controverted question of fact, we feel, however, that there are certain mountain peaks in the evidence that very strongly support defendant's contention that Mequinn Company, in its dealings with plaintiff, was not acting as defendant's agent, and we think that justice will be best served by a retrial of this cause. In view of the fact that this case will in all likelihood be retried, we purposely refrain from analyzing and commenting upon the evidence.

Defendant raises other points, but we do not deem it necessary to pass upon the same, as the alleged errors are not likely to occur upon a second trial.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND REMANDED.

Sullivan, P. J., and Friend, J., concur.

40212

BENJAMIN G. KILPATRICK, as Successor-Trustee,
(Plaintiff) Appellee,

v.

ELMER G. OLSON et al.,
(Defendants) Appellees.

THOMAS J. McMAHON, Receiver, for the use and benefit of CHARLES L. McNAMARA, Receiver's Attorney,
Appellant,

v.

BENJAMIN G. KILPATRICK, ELMER G. OLSON et al.,
(Plaintiff and Defendants) Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

301 I.A. 599

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A very scant record has been presented to us upon the instant appeal. From it we learn that a suit was filed to foreclose certain premises in Cook county, Illinois; that on June 28, 1932, Thomas J. McMahon was appointed receiver for the property, and that on July 27, 1932, he was authorized to employ as his solicitor Charles L. McNamara; that on March 31, 1938, the receiver filed his verified final report, from which it appears that on March 3, 1938, the period of redemption expired and possession of the premises was surrendered to Benjamin G. Kilpatrick, holder of the master's deed issued under the decree of sale entered in the cause; that from the date of his appointment to November 30, 1937, the receiver collected in rents $16,796.47 and made expenditures of $15,198.69; that from November 30, 1937, to March 15, 1938, he further collected in rents $1,112.01 and made expenditures of $898.57; that on March 15, 1938,

he had on hand $1,811.20; that he had theretofore received on account of receiver's fees the sum of $840, and he asked that he be allowed the further sum of $200 as compensation for his services as such receiver and that an order be entered directing him to pay to his attorney a reasonable solicitor's fee for services rendered; that the receiver be directed to pay the balance of the moneys to said Kilpatrick on account of the deficiency decree entered in the cause, and that he be discharged as receiver. On the same date that the receiver's final report was presented to the court his attorney filed his verified petition for attorney's fees, which contains, inter alia, the following:

"DATE"		HOURS	FEES
July, 1932 to Jan. 1937	Services rendered, as more particularly set forth in statements heretofore filed herein, amounting to - - -	101	
Up to Jan. 1937	Received on account of Attorney's fees - - - - -		$400.00
Jan. 1937 to July 1937	Looking up the records; Attendance to various conferences and letters; examination of Receiver's vouchers; preparation of Receiver's petition, Semi-Annual Report, Court Order, etc., and attendance in Court in Connection therewith -	16	
Oct. 1937	Received on account of Attorney's fees - - - - - - - - - - - - -		25.00
July 1937 to Dec. 1937	Looking up the records; Attendance to various conferences and letters; preparation of eviction suit in the matter of the Receiver vs. L. J. Harskey, Mun. Ct. Case No. 3546239; attendance in Court in connection with said eviction suit; examination of Receiver's petition, drawing Semi-Annual Report, Court order, etc., and attendance in Court in connection therewith - - -	22	
	Received on account of Attorney's fees - - - - - - - - - - -		None
Dec. 1937 to Mar. 1938	Looking up the records; attendance to various conferences and letters; attendance in Court in connection with Complainant's		

he had on hand [illegible]; that he had therefore received on account of receivership [illegible] he asked that he be allowed the further sum of [illegible] for his services [illegible] such receiver [illegible] attorney [illegible] that the receiver [illegible] on account of [illegible] be [illegible] report [illegible] petition [illegible]

Jul. [illegible] to Jan. 1927	[illegible]	[illegible]
Up to Jan. 1927	[illegible] received on [illegible]	[illegible]
Jan. 1927 to July 1927	[illegible]	[illegible]
Oct. 1927	[illegible] received on [illegible]	[illegible]
July 1927 to Dec. 1927	[illegible]	[illegible]
	Receiving on account of [illegible]	None
Dec. 1927 to Mar. 1928	Looking up the receiver's attendance to various conferences and hearings; attendance in Court in connection with Complainant's	

motion and petition on March 6, 1938; examination of Receiver's vouchers; drawing Receiver's petition, Final Report, Court Order, etc., and attendance in Court in connection with Receiver's Final Report - - - - - -	20	
Received on account of attorney's fees - - - - - - - - - - - -		None
TOTAL NUMBER OF HOURS - - - - - -	159	
TOTAL RECEIVED ON ACCOUNT OF FEES - - - - - - - - - - - - - - -		$425.00"

The petition concludes as follows:

"Wherefore, your petitioner prays that he may be allowed the sum of $400.00 as compensation for services rendered as attorney for the Receiver herein.

[Signed] "Chas. L. McNamara
Attorney for Receiver."

On March 31, 1938, the trial court entered an order directing the receiver to pay his attorney the further sum of $100, allowed the receiver the further sum of $60 on account of his services rendered as receiver, ordered the receiver to pay the balance to said Kilpatrick on account of the deficiency decree, and discharged the receiver upon his filing with the clerk of the court the receipts "for said payments as hereinabove directed." On April 19, 1938, a verified petition was filed by the receiver's attorney praying that the order of March 31, 1938, "be modified and amended, so that the same shall provide that there shall be paid by the receiver in due course to this petitioner, as and for attorney's fees for said services rendered, as aforesaid, the sum of $400.00." The petition recites that the time expended in connection with his duties as attorney for the receiver "is at least 159 hours;" "that he believes the fair, reasonable and customary charge in this jurisdiction in matters of this kind, or involving said services, is the sum of at least $5.00 and upwards for each and every hour expended in connection with said legal services," and that after crediting the sum of $425 theretofore paid him on account of legal services there is due and owing to the petitioner the sum of

motion and petition on March 6, 1938; examination of Kenneth [illegible] voucher [illegible] petition, [illegible] order, [illegible] hours [illegible] connection with Re-
ceiver's final [illegible]

[illegible]

[illegible]

The petition [illegible]

[illegible] the sum of [illegible] for the Receiver [illegible]

[illegible]

[illegible] March [illegible] 1938, [illegible] receiver [illegible] receiver [illegible] receiver, [illegible] on account of [illegible] his claim [illegible] mente [illegible] was filed [illegible] 1938, "[illegible] there shall be [illegible] as and for attorney's [illegible] the sum of [illegible] connection with [illegible] 150 hours;" "[illegible] charge in this jurisdiction [illegible] said services, is the sum of [illegible] every hour expended in connection with said legal service," and that after crediting the sum of $[illegible] therefore paid him on account of legal services there is due and owing to the petitioner the sum of

$400. On the same date the trial court entered an order denying the prayer of the petition. The order recites that "no evidence having been offered as to said alleged services of said attorney, it is ordered that said motion be and the same is hereby denied." The notice of appeal, filed April 20, 1938, recites that the appeal is taken from that part of the order of March 31, 1938, "which adjudges that said receiver be and is thereby directed to pay, out of the balanc on hand, the sum of $100.00 to said Charles L. McNamara as compensation for said legal services as attorney for said receiver." On April 25, 1938, five days after the notice of appeal was filed, the law partner of the attorney for the receiver filed with the clerk of the court his affidavit, which sets up certain alleged facts that he claims occurred in court on April 19, 1938, and March 31, 1938. It is hardly necessary to state that we cannot consider this affidavit.

On June 29, 1938, there was filed in this court a motion, supported by an affidavit, of the appellee Kilpatrick, as Successor-Trustee, to dismiss the appeal of the receiver. We reserved ruling upon this motion until the hearing of the cause. The argument in support of the motion is that "the receiver had no personal interest in what the court allowed his attorney for the services rendered by his attorney to the receivership estate and he has no right to set up his own judgment against that of the court which had appointed him and which had allowed to his attorney the sum of $100, which sum in the court's discretion was deemed sufficient;" that "the orders entered on March 31, 1938 and April 19, 1938 did not aggrieve the receiver personally; hence the receiver as an officer of the court cannot maintain and prosecute this appeal for the use and benefit of his attorney, as is herein attempted;" that the receiver did not complain that he had not received sufficient compensation under the order of March 31, 1938, and that it is clear from the record that the only partywho claimed that he had not received sufficient compensation is the attorney for

the receiver. While the motion to dismiss is not without some merit, we have concluded to deny it.

Appellant contends that "the final report and the petition for attorney's fees and the petition to modify the order of March 31, 1938, were all taken pro confesso as against the plaintiff and defendants by operation of law, as the want of a mere entry that the same were taken pro confesso on default does not affect the justice of the case;" that "the allowance for the receiver's attorney's fees is grossly inadequate," and that we should reverse the orders appealed from, with such directions to the trial court as we may deem just and equitable.

Appellant argues that the facts set up in the receiver's verified final report, in the verified petition of the attorney for attorney's fees and the petition to modify the order of March 31, 1938, were conceded by plaintiff and defendants because of their failure to answer the same or to dispute the facts therein set forth; that the said report and petitions must be regarded as taken pro confesso against plaintiff and defendants; that the court was precluded from inquiring into the matter of the allowance of attorney's fees save by an examination of the said report and petitions, and that it was the duty of the court to allow the fees requested. This argument is without the slightest merit. A receiver, "being an officer of the court, the fund or property intrusted to his care is regarded as being in custodia legis for the benefit of whoever may finally establish title thereto, the court itself having the care of the property by its receiver, who is merely its creature or officer, having no powers other than those conferred upon him by the order of his appointment, or such as are derived from the established practice of courts of equity." (High on Receivers, 4th Ed., sec. 1.) "A receiver is frequently spoken of as the 'hand of the court,' and the expression very aptly designates his functions, as well as the relation which he sustains to the court."

the receiver. While the motion to dismiss is not without some merit, we have concluded to deny it.

Appellant contends that "[illegible] the petition for attorney's fees [illegible] March 31, 1938, were all taken pro [illegible] the [illegible] defendants by operation of [illegible] were taken pro confesso [illegible] of the case;" that "the allegations [illegible] grossly inadequate, [illegible] from, [illegible] and result.

[illegible] the receiver's [illegible] for [illegible] 31, 1938, were [illegible] of their [illegible] that the [illegible] confesso [illegible] from [illegible] by an examination [illegible] duty of the [illegible] without the [illegible] court, the time or [illegible] in quotidia legis for the [illegible] title thereto, the court [illegible] receiver, who is merely [illegible] than those conferred upon him by [illegible] or as are derived from the [illegible] of equity." (High on Receivers, 4th Ed., sec. 1.) "A receiver is frequently spoken of as the 'hand of the court,' and the expression very aptly designates his functions, as well as the relation which he sustains to the court."

(Ib. sec. 2.) Even though the plaintiff and defendants had stipulated as to the fees to be allowed, such stipulation would not bind the court. The instant case was commenced in 1932, at the height of the great world-wide depression and when the courts of Cook county were practically overwhelmed with foreclosure suits. If the courts did not hold receivers to strict account, thousands of unfortunate people would be unjustly deprived of their interest in property that was in custodia legis.

Appellant concedes that the law is well settled that fees are never allowed directly to a receiver's attorney, but are allowed to the receiver, as a part of his expenses, and that the attorney has no right of action for his services. It will be noted that the receiver, in his final report, prayed "that an Order may be entered directing him to pay to Charles L. McNamara a reasonable fee for services rendered as Attorney for Receiver herein." The report stated no facts that would justify the allowance by the court of additional attorney's fees. While the receiver's attorney also filed a personal petition in which he prayed "that he may be allowed the sum of $400.00 as compensation for services rendered as attorney for the Receiver herein," the trial court would have been justified in striking this petition or in ignoring it. The trial court would also have been justified in refusing to allow the attorney for the receiver to file his personal petition of April 19, 1938. No oral testimony was offered in open court as to the nature of the services rendered by the attorney and what would be a reasonable fee for such services. In passing upon the amount of the fee that should be allowed the receiver for attorney's services the able and careful trial judge had before him the entire record in the case - we have no such record - and he reached the conclusion that as the receiver had already been allowed $425 for attorney's fees an additional allowance of $100 would be a reasonable allowance. The court was not bound by the

(Ib. sec. 2.) Even though the plaintiff and defendants had stipulated as to the fees to be allowed, such stipulation could not bind the court. The instant case was commenced in 1935, at the height of the great world-wide depression [illegible] of Cook County were practically [illegible] the courts did not hold receivership [illegible] people would be [illegible] in custodia legis.

[illegible] are given [illegible] to the receiver, [illegible] no part of [illegible] ceiver; [illegible] directing him [illegible] that [illegible] rate [illegible] additional [illegible] file the [illegible] attorney [illegible] and a petition [illegible] sum of [illegible] the receiver [illegible] striking [illegible] have been [illegible] the receiver to file his [illegible] testimony was offered in [illegible] by the attorney [illegible] services. In passing upon the [illegible] allowed the receiver for attorneys' [illegible] trial judge had before him the entire record in the case - [illegible] no such record - and he reached the conclusion that as the receiver had already been allowed $425 for attorney's fees an additional allowance of $100 would be a reasonable allowance. The court was not bound by the

opinion of the attorney as to what was a just and reasonable fee for his services, but he had a right to examine into the entire record to determine what was a reasonable fee, and it is our duty to sustain the finding of the trial court unless we can see that the amount allowed was manifestly wrong. We are satisfied that we cannot say, under the record before us, that the allowance was manifestly inadequate.

The orders of the Superior court of Cook county of March 31, 1938, and April 19, 1938, are affirmed.

ORDERS OF MARCH 31, 1938,
AND APRIL 19, 1938, AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

opinion of the attorney [illegible] as a just and reasonable fee for his services, but [illegible] right to [illegible] the entire record to determine [illegible] fee, and it is our duty to sustain the ruling of [illegible] that the amount allowed [illegible] we cannot say, [illegible] was manifestly [illegible].

The order [illegible] 31, 1929, [illegible].

[illegible]

40541

JOSEPH ROGACKI, Appellee, vs. BAIRD & WARNER, INC., a Corporation, et al., Defendants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
BAIRD & WARNER, INC., a Corporation, Appellant.	

301 I.A. 599

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Baird & Warner, Inc., hereafter called defendant, and Pierce W. Jones, Receiver, to recover damages for personal injuries; the jury found Jones, Receiver, not guilty and Baird & Warner, Inc., guilty and fixed the damages at $3000; the trial court ordered a remittitur of $1000 and judgment was entered against defendant for $2000, from which it appeals.

Plaintiff was injured by the falling of a pane of glass from a transom above a door leading into a building in charge of a receiver. The question presented is whether defendant or the Receiver was in exclusive possession of the premises and charged with keeping them in repair. Defendant appealing first argues that the Receiver was in exclusive possession and charged with making repairs.

The premises is a three story building located at 925 Milwaukee avenue, Chicago, and was the subject of a foreclosure proceeding. November 22, 1934, Warner Baird was appointed receiver of the premises, "to take possession of and to collect and receive all rents, issues and profits from, and control and manage the premises ** with usual powers of receivers in like cases, including the power to rent said premises and to collect the rents thereof, and out of the income from said premises to maintain the same in

necessary repair, to keep the same insured, to pay taxes, assessments and water rates thereon, all wit out requiring separate and further orders from this Court for each such expenditure and to hold the net proceeds subject to the further order of this Court." Baird qualified as receiver by giving bond.

Warner Baird is the president of defendant company, which is in the real estate and renting business. One of its employees, Donald C. Snyder, testified that shortly after Baird was appointed receiver, under instructions from him, he went to the premises and there talked to a man named Labroich, who had a drug store on the first floor, about making a written lease; that Labroich was also occupying a portion of the third floor with medical supplies and other equipment; that Labroich said he would prefer not to enter into a written lease, and an oral arrangement was made that he would pay $40 a month rent for the entire building, and if at any future time he was able to sublet any portion of the second or third floors would pay additional rent, the tenant to be responsible for the operation and maintenance of the building with the exception of roof repairs, which would be paid for by the receiver. Snyder testified that subsequently he called upon the tenant about once a month to collect the rent.

Labroich testified that at this conversation Snyder told him defendant was taking charge of the building and that he should pay rent to no one but defendant; that Snyder said any time repairs were necessary Labroich "should notify them and they will take care of it."

Plaintiff testified that he did occasional work for Labroich, such as mopping the floors and the stairway; that on May 29, 1936, he went with a broom, mop and bucket to the second floor and swept the floor and stairway. Apparently the entrance to this stairway is from the street, alongside the drug store occupied by Labroich.

Plaintiff said that after finishing his work he was going out of the street door to go to the drug store, and as he closed the street door the glass from the transom fell and hit him on the head just above the eye, inflicting the injuries of which he complains.

In a written statement made after the accident, signed by both plaintiff and Labroich, it is stated that the entire building was leased to Labroich.

Snyder testified that he talked with Baird, receiver, about the collection of rents and various things of that kind; that according to the records of Baird & Warner the entire building was leased to Labroich; Snyder testified that no one else connected with defendant had anything to do with this building; that he did not recall anything else that he did with reference to it until nearly two months after plaintiff received his injuries, when a fire occurred on the second and third floors of the building.

In a petition filed August 24, 1936, by Baird in the foreclosure proceeding he stated that after he qualified as receiver he took possession of the premises at 925 Milwaukee avenue "and has continuously since then managed and supervised the operation of said premises;" that he had ascertained the name of the Fire Insurance company insuring the premises and had notified it of his interest therein; that July 20, 1936, the premises were damaged by fire; that he examined the premises and estimated the amount of the damage, and at the request of the Insurance company made a sworn statement in the Proof of Loss, claiming damages of $820.56, and recommending a settlement for this amount to restore the premises to their former condition; he asked for and secured an order from the court authorizing him to contract and pay for the necessary repairs and materials. Snyder testified that he arranged with the contractors to repair the fire damage; that he had no knowledge as to who replaced the glass in the transom where

plaintiff was injured. Warner Baird as receiver brought suit against Labroich for unpaid rent.

December 17, 1936, Baird filed his final report as receiver with a detailed account of receipts and expenditures, with special reference to his settlement with the Fire Insurance company and disbursements in repairing the fire damage; in this he stated he had used his best efforts to manage the property but had been unable to put it on a paying basis and therefore asked the court to accept his resignation as receiver.

March 17, 1937, Pierce W. Jones was appointed Receiver to succeed Baird. Jones testified that when appointed receiver he made an inspection of the premises; that Labroich had the keys and took him to the second and third floors; that a portion of these floors was occupied by utensils used in connection with chemicals and drugs which Labroich said belonged to him; that subsequently Labroich removed this equipment, giving witness clear possession of the second and third floors.

Defendant's position is that at the time plaintiff received his injuries Baird as receiver was in exclusive possession and control of the premises, charged with the duty of keeping them in repair; that this is established by the order of his appointment and by the petitions and orders filed in the case. Defendant challenges plaintiff to point out any evidence that defendant was in possession of the premises and asserts that the only duty of defendant was to collect the rent for the receiver.

In Smith v. Rutledge, 332 Ill. 156, Fannie Rutledge alleged that she employed the Illinois State Trust Company to rent and manage her property as her agent; that the agent had full control of the heating plant; that the furniture and wearing apparel of plaintiff and family were burned by the negligent operation of the heating plant. The court said that to make an agent liable, "The agent * must be in possession of the premises and have the entire and

exclusive control thereof. (Kepperly v. Ramsden, 83 Ill. 354.) All liability for injuries sustained is based upon the theory that the party liable has committed a wrong or neglected some duty; that direct or consequential injury has resulted from the employment of immediate force or the negligent performance of some legal duty or in the negligent use of persons or property, whereby an injury has resulted to another. (Scammon v. City of Chicago, 25 Ill.361.)" The court found that the trust company was the agent of Mrs. Rutledge to rent the premises and collect the rent but not to make repairs and maintain the premises. The judgment against the trust company was reversed.

Both counsel cite authorities holding in general terms that the possession of the receiver is the possession of the court appointing him and he cannot delegate his duties to any other person. This does not touch the point involved, which is: Was there any evidence to go to the jury that at the time plaintiff was injured defendant was in possession of the premises and charged with the duty of maintaining them in repair? Plaintiff's brief fails to point out any evidence that this was defendant's duty.

We are in accord with the statement of counsel for defendant that Warner J. Baird, Receiver, was in possession and control of the building and that the duty, if any, of keeping the building in repair was upon him as receiver. Baird having resigned as receiver, counsel for plaintiff properly made his successor, Jones, a party defendant, as the law is that an action can be maintained against a receiver for the torts of his predecessor in the same receivership. McNulta v. Lockridge, 137 Ill. 270. However, plaintiff does not complain of the verdict finding Jones, Reveiver, not guilty, but says that the state of the record justifies this finding. If the question were submitted to us for decision we would be inclined to hold to the contrary.

Plaintiff argues that he can recover under the doctrine of

Plaintiff argues that he can recover under the doctrine of

res ipsa loquitur, upon the theory that a prima facie case was made by merely showing that the glass fell from the transom, injuring him. This doctrine applies only when the thing causing the accident is in one's exclusive management, possession and control. Under such circumstances the accident speaks for itself and places on the one in control the duty of showing that it was not occasioned by negligence on his part. Hart v. Lincoln Park Club, 157 Ill. 9; Bollenbach v. Bloomenthal, 341 Ill. 539.

Plaintiff argues that the question of possession and control of the premises is the usual question of fact and that the verdict of the jury against the defendant in this respect should not be disturbed. We are of the opinion that there was no evidence tending to show that defendant was in exclusive control and possession of the premises in question.

At the conclusion of the trial defendant moved the court to instruct the jury to find it not guilty; ruling on this was reserved until after the verdict; subsequently defendant made a motion for a new trial and that judgment be entered in its favor notwithstanding the verdict. The motion for a new trial was denied as was the motion for judgment notwithstanding the verdict. We hold that the latter motion should have been allowed and judgment entered for the defendant, Baird & Warner, Inc.

The judgment of the Circuit court against the defendant is reversed without remanding.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

40562

JACOB GLICK,
Appellant,

vs.

NATHAN F. WALLACH and LEO WALLACH,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

301 I.A. 600

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover on defendants' guaranty of certain bonds secured by a trust deed, claiming $3794.45; upon trial by the court a finding was entered for defendants, from which plaintiff appeals.

The question is whether defendants were released from liability under their guaranty by their discharge in bankruptcy proceedings in the Federal District Court for the Southern District of California.

Plaintiff alleged that December 1, 1925, the Roselle Building Corporation made and delivered to plaintiff certain coupon bonds secured by trust deed; that defendants, by indorsement in writing on these bonds, jointly and severally guaranteed payment in full when due. Defendant Nathan F. Wallach answered that he was discharged in bankruptcy April 3, 1931; defendant Leo Wallach answered that he was discharged in bankruptcy May 1, 1931, and that the debt set forth in plaintiff's statement of claim was duly scheduled in the bankruptcy proceedings.

Plaintiff says that the debt upon which the cause of action is founded was unaffected by the discharge in bankruptcy because the debt was not duly scheduled pursuant to the provisions of the federal bankruptcy act in force at the time.

It was stipulated that the bonds sued on were scheduled in the bankruptcy proceedings of Nathan F. Wallach as follows:

"While in the business of construction of buildings, either individually, with Leo Wallach as copartner, petitioner's connection with Wallach Bros., a corporation, and his connection with Wallach

Investment Trust, a Common Law Trust, he signed certain bonds and notes secured by real estate mortgages also guaranteed or endorsed or both, all notes or bonds secured by real estate mortgages, and delivered the same to the Bonding Companies hereinafter called the 'Issuer' - that in that connection a complete list - to the best of petitioner's information obtained thru due and diligent search - are as hereinafter shown - that there also appeared as endorsers or guarantors on such notes or bonds Irma Wallach, and Mildred Wallach.

Note: All street addresses are in Chicago, Illinois - Recording Document Numbers are records of Recorder of Cook County, Illinois.

Name of Creditor: Herman S. Strauss, Trustee, Straus Bros. Co., Bondholder's Protective Committee, James J. Kelly, Secy.
Address: 33 N. LaSalle Street
Date of Issue: 12/1/25
Number: 9119045
Description: Roselle Bldg., 4875 Ainslie St. Cor. Magnolia.
No. of Bonds: 450
Amount of Indebtedness: $265,000.00."

The schedule of defendant Leo Wallach was in substantially the same form; both defendants received a discharge in bankruptcy from the District Court of the United States for the Southern District of California, Central Division.

Whether the trustee of a bond issue is a creditor within the meaning of the bankruptcy act depends upon the provisions of the particular trust deeds involved. In Cochenour v. Griever, 295 Ill. App. 366, it was held that nothing in the trust deed in that case authorized the trustee to file a claim in bankruptcy; that this right is solely vested in the holders of the bonds. Other cases cited by plaintiff are to the same effect.

But it has been held that a trust deed may constitute a trustee a creditor. In re Paramount Publix Corporation, 72 F.(2d) 219, 222; In re United Cigar Stores Co., 68 F.(2d) 895; In re International Match Corporation, 3 F. Supp. 445. Section 1, article 9 of the instant trust deed authorizes the trustee, in case of any default by the mortgagor, including the payment of principal and interest on any of the outstanding bonds, to institute "such suit or suits, in equity or at law, in any court of competent jurisdiction, to enforce and protect any of his rights, or the rights of the bondholders hereunder as he may deem proper." Section 5 of article 9 provides that "In any case in which under the provisions of this

Article the Trustee has the right to institute foreclosure proceedings, the Mortgagor agrees to pay to the Trustee upon his demand, for the benefit of the holders of the bonds hereby secured and then outstanding, the whole amount then due and payable on all such bonds for interest or principal, or both, as the case may be, with interest on the overdue installments of principal and interest at the rate of seven per cent (7%) per annum, and all other sums which may be due hereunder or secured hereby. In case the Mortgagor shall fail to pay the same forthwith upon such demand, the Trustee, in his own name and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid." Section 6 of article 9 makes the trustee the representative of the bondholders in all litigation pertaining to the trust deed and makes it unnecessary to notify any bondholder or to make any bondholder a party to any action, suit or proceeding to bind or conclude the bondholder. The trust deed also contains a provision that the bondholder accepts the bond subject to the understanding and agreement "that every right of action whether at law or in equity upon or under this indenture, is vested exclusively in the trustee." It would seem to follow from these provisions that the trustee was a creditor of the mortgagor and that his name was duly scheduled as a creditor in the schedules filed in the bankruptcy proceedings as representing all the bondholders.

Defendants, moreover, say that even if the trustee was not a creditor within the meaning of the bankruptcy act, plaintiff's claim was barred by the discharges in bankruptcy because defendants fully complied with the requirements of the bankruptcy act as to the scheduling of a debt of an unknown creditor. The bankruptcy act provides that "The bankrupt shall file *** a schedule of his property, *** a list of his creditors, showing their residences, if known, if unknown, that fact to be stated ***." (11 U. S. C. A., sec. 25.) And that "A discharge in bankruptcy shall release a bankrupt from

[illegible]

provides that "[illegible] *** a list of his creditors, stating their residences, if known, if unknown, that fact to be stated [illegible]." (11 [illegible], sec. 25.) And that "A discharge in bankruptcy shall release a bankrupt from

all of his provable debts, except such as *** (third) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." (11 U. S. C. A., sec. 35.)

Plaintiff argues that the schedules do not contain the addresses of the bondholders and do not show that they could not have been obtained "through due and diligent search." These schedules contain the name and address of the trustee, the house of issue and the bondholders' protective committee; the indebtedness, location of the security and the document number of the trust deed. It is also recited that the list is "complete *** to the best of *** (their) information, obtained through due and diligent search."

The relevant provisions of the bankruptcy act on this point are, that the bankrupt shall file a schedule of his property "and a list of all his creditors *** showing their residences, if known, or if unknown that fact to be stated." (Sec. 25 (a)). Also, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as *** (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, *** ." (Sec. 35 (a)).

Section 25 (a) requires that where the residence of a creditor is unknown, that fact must be stated. The evidence shows that defendants requested from Straus Bros. Co., the house of issue, a list of the bondholders under this particular mortgage, and the request was refused. The schedules contain all the available information, with the names and addresses of all persons having any connection with the mortgage indebtedness. We hold this is all that was required of the defendants to entitle them to a discharge in the bankruptcy proceedings and releases them from all obligations under their guarantys of the notes upon which plaintiff brings suit.

The judgment entered by the trial court was proper and it is affirmed.

AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

all of [illegible]

[illegible]

having [illegible]

is all [illegible]

discharge in [illegible] all obligations [illegible] plaintiff brings suit.

The judgment entered by the trial court [illegible] it is affirmed.

AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

40544

CORRIE H. STRIBLING,
Appellee,

vs.

THOMAS L. GRACE et al.

JOHN F. KENT,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

301 I A. 600

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against 21 persons and one corporation to recover damages for fraud and deceit claimed to have resulted through defendant selling plaintiff $25,000 face value of collateral 6% gold notes. On the day the case went to trial, on motion of plaintiff the suit was dismissed as to all the defendants except John F. Kent. There was a jury trial, it returned a verdict finding defendant guilty and assessing plaintiff's damages at $6500. The jury was given a special interrogatory, viz., "Does the jury find from the evidence in this case that malice is the gist of the action?" This was answered in the affirmative and was signed by each of the 12 jurors. Afterward defendant's motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was denied, judgment was entered on the verdict and defendant appeals.

The record discloses that Kent, Grace & Company, a corporation of which defendant Kent was one of the organizers and afterward a director and vice president, was engaged in "underwriting and distributing securities" in Chicago; that Kent was an officer and director of the Southern Indiana Telephone and Telegraph company and of the "Decatur County Independent Telephone Company." These two companies operated two telephone systems in Indiana. Afterward there was organized the Southern Indiana Consolidated Utilities Corporation, a Delaware corporation, of which also Kent was an

officer and director. The Consolidated company was a holding company and acquired 9,995 of the 10,000 shares of the Southern Indiana stock and also 1,188 of the 12,000 shares of the Decatur County telephone stock. February 15, 1930, the Consolidated company issued $500,000 face value of "Collateral 6% Gold Notes," payable February 15, 1931, at the office of the Continental Illinois Bank and Trust Company of Chicago, and on February 15, 1930, the Consolidated company entered into a trust indenture with the Continental Bank as trustee, and deposited with the trustee the 9,995 shares of stock of the Southern Indiana Telephone and Telegraph company and the 1,188 shares of the Decatur company as collateral to secure payment of the $500,000 gold notes.

Plaintiff charged that the stock of these two companies was of little or no value at the time. Defendant Kent denied plaintiff's allegations in this respect and averred that the $500,000 notes were purchased by Kent, Grace & Co. from the Consolidated company.

The record further discloses that Thomas Welsh, an independent broker and seller of stocks and bonds, was acquainted with plaintiff's son, Jess H. Stribling, then 26 years old, and who acted as agent for his mother. Welsh, through brokers, brought about the sale to plaintiff, through her son, of $25,000 notes of the Consolidated company, paying for them by turning over the following securities belonging to plaintiff: $10,000 State of Illinois Highway 4½s due in 1946; $5,000 Sanitary District of Chicago 4½s, 1937, $3,000 City of Aurora 4½s due 1937; $5,000 County of Chippewa 4½s, due 1935, and $2,000 City of Rockwood 4½s due 1937. Kent, Grace & Company issued a prospectus of the $500,000 gold notes which purported to show what was back of the notes - the properties of the Consolidated company, ownership of the stock of the two telephone companies, the earnings of the two subsidiary telephone companies for 12 months ending

December 31, 1929; the purpose of the issue, management, etc. At the bottom of the prospectus was printed, "The information and statistics contained in this circular are not guaranteed, but have been obtained from reliable sources and we believe them to be accurate." There is also evidence in the record of the annual report made by the two Telephone companies to the Public Service Commission of Indiana. As a matter of fact bonds of the face value of $80,000 were sold to plaintiff. Afterward 125,000 of them were returned, so that only $25,000 worth of them are involved in the instant case. The interest falling due August 15, 1930, was paid but no part of interest or principal which was due February 15, 1931, was paid, and afterward the Continental Bank, as trustee, sold the collateral stock pledged with it for $200,000, out of which plaintiff was paid her pro rata share of the proceeds, $9,935.50.

Counsel for plaintiff contends that the evidence, much of which we have not adverted to, shows that the two Indiana telephone companies had been operating at a loss, as shown by the reports of these companies filed with the officials of Indiana, and that the properties of these two companies, which were heavily encumbered, were the only properties that could be looked to for the payment of the $500,000 notes; that the evidence all shows the notes were of little or no value when they were sold, and the verdict of the jury was warranted except that it was for too small an amount.

On the other hand, counsel for defendant contends that the evidence is wholly insufficient to support the verdict and that there were procedural errors in the rulings on admitting and excluding evidence and in the instructions to the jury, which require a reversal of the judgment; that "The question of whether the collateral was ample, at the time, to secure the payment of the notes was one of opinion, on which experts might disagree," and in such case an action for fraud and deceit will not lie.

We cannot pass upon the several contentions made by opposing counsel for the reason that counsel for plaintiff has moved the court to strike the report of the proceedings at the trial because it was not filed in the trial court within 50 days after the notice of appeal was filed, as required by rule 1 of this court and rule 36 of the Supreme court.

The record discloses the case went to trial July 5, 1938. The jury returned its verdict July 8; July 11 the court entered judgment on the verdict and 3 days thereafter, July 14, defendant filed his written motion for judgment notwithstanding the verdict, or in the alternative to set aside the verdict and grant a new trial. August 22nd the 2 motions were denied, and it was ordered that in case defendant appealed the supersedeas bond should be $10,000. August 29, 1938, defendant filed his notice of appeal from the order entered August 22nd. The report of proceedings at the trial was filed October 21st, or 53 days after the notice of appeal was filed.

Rule 1 of this court, which is identical with paragraph (c) of Rule 36 of the Supreme court, provides that the report of the proceedings at the trial "which appellant desires to incorporate in the record on appeal, shall be procured by the appellant and submitted to the trial judge *** for his certificate of correctness, *** and filed in the trial court within 50 days after the appeal has been perfected." The provision of the rule just quoted was amended by order of the Supreme court April 20, 1938, by striking out "60" days and inserting in lieu thereof "50" days. And Rule 71 of the Supreme court, which was adopted by that court at the April Term, 1938, provided: "These rules shall be in effect August 1, 1938, and shall be in lieu of all rules in the schedule to the Civil Practice Act and of all other rules of this court heretofore in force." July 7, 1938, this court entered an order amending Rule 1 to correspond with

[illegible]

[illegible]

order of [illegible]

and [illegible]

court, [illegible]

provided: "[illegible]

be in lieu of all rules [illegible] not

and of all other rules of [illegible] court [illegible] are in [illegible]." July 7,

1938, this court entered an order [illegible] to correspond with

Rule 36 of the Supreme court as amended.

Counsel for defendant in opposition to the motion to strike say that while "The report of Proceedings was approved and ordered filed by him on October 21, 1938, which was 53 days after the Notice of Appeal was filed," that Rule 1 of this court and Rule 36 of the Supreme Court of Illinois effective August 1, 1938, say, "The Report of Proceedings shall be presented within 50 days from the day the Notice of Appeal is filed but the rules are not applicable here for the following reasons"; (1) that the judgment was entered July 8th and the rules then in effect allowed 60 days within which to file the report of the proceedings, and that the 60 days should control rather than the 50 days; and (2) that even if the 50 day rule was applicable it does not follow that the report of the proceedings must be stricken if filed after the 50 days, but that in such situation the court has a discretion; and in support of this it is said that while paragraph (c) of Rule 36 provides that the report shall be filed within 50 days, paragraph (e) of the same rule provides that failure to file the report within 50 days shall "authorize" a dismissal. We think this contention cannot be sustained. Consideration of the Practice act and the rules of the Supreme court adopted pursuant thereto, show that it was the intention to dispose of causes expeditiously and in an orderly manner. In Rule 1 and Rule 36 provision is made that upon good cause shown the trial court may make "an order or orders extending the time allowed for filing such report of the proceedings," providing the application for such order be made before the expiration of such original period, and that "The extension of time for filing the report of proceedings shall not exceed a period of 45 days from the last day fixed by this rule for filing the report of proceedings." The rule then provides that "Further extensions of time shall be granted only by the reviewing court, or a justice thereof in vacation." If, as counsel for defendant contend, that whether the rule be enforced is within the discretion of the

[illegible]

trial judge, the whole procedure might be disrupted and the 50 day period mentioned in the rule would be meaningless.

But counsel for defendant further contend that the rule is not applicable here for the reason that Rule 57 of the Supreme court which provides for reporting and publishing the opinions of the Supreme court contains the following provision: "Such rules as may be from time to time adopted by the court shall be published in the volume next succeeding their adoption." And one of defendant's counsel, who had the matter of the preparation of the appeal, swears that about October 1st he examined the published Supreme Court Reports, particularly volume 368 which at that time had been issued but a few days, and in that volume the rules of the Supreme court were published, including Rule 36, and as there printed it required the report of the proceedings of the trial judge filed in the trial court within 60 days after the appeal had been perfected and not within 50 days; and that he had no knowledge that the Supreme court had amended that rule on April 20, 1938, which amendment was to be effective as of August 1, 1938. And the argument is that the only official publication of the rules of the Supreme court, and upon which counsel are entitled to rely, are those published pursuant to Rule 57 of the Supreme court. We are unable to agree with this contention. July 21, 1938, the Chicago Daily Law Bulletin printed the amendments to the rules adopted by the Supreme court April 20, 1938, with explanation thereof by Mr. Albert E. Jenner, Jr., "Chairman of the Section on Civil Procedure, Practice and Pleading of the Illinois State Bar Association; Secretary of the Chicago Bar Association." This issue of the Bulletin showed that Rule 36 of the Supreme court, as amended, required the report of the proceedings of the trial to be filed in the trial court within 50, not 60, days as theretofore. Afterward this court, July 7, 1938, amended its rules to conform to the rules of the Supreme court as amended April 20, 1938, and caused publication of the order (showing

the change from 60 days to 50 days and a note following the order) to be made in the Chicago Daily Law Bulletin for July 9, 11 and 12. The Daily Law Bulletin is relied upon by all lawyers practicing in Chicago and such has been the fact for more than forty years. The note following the order as published in the 3 editions of the Bulletin stated that we had amended Rule 1 of this court, etc., "to conform to the Rules of Practice of the Supreme Court of Illinois, which were amended by the Supreme Court at the April Term, 1938.

"The new rules of practice of this court will not be ready for distribution for 10 days, at which time copies may be had at the clerk's office," and that such rules would be effective August 1, 1938. We also caused this order and the note following it to be published in the National Corporation Reporter of July 8, 1938. This paper circulates generally among the lawyers of Chicago and contains legal publications, etc. The amendment to the rules of April 20, 1938, also appeared in volume 293, Illinois Appellate Court, which volume was distributed about the middle of September, 1938.

From the foregoing it appears that wide publication was had of the fact that the Supreme court had at the April term amended its rules and what the amendments were.

Counsel for defendant in their suggestions filed in opposition to the motion to strike say, "we are informed however that it (the amended rules of April 20, 1938) will appear in bound volume 370." We think it obvious that counsel for defendant ought not be permitted to contend that the only official publication of the rules, or any amendments thereof, was to be found in the official bound volume of the opinions of our Supreme court. It is common knowledge that the bound volume is not and cannot be printed and distributed for a considerable period of time after sufficient opinions of the court have been filed. If counsel's contention were sustained, the practice of appealing cases and all other matters governed by rules

bound volume. It [illegible] the [illegible] considerable [illegible] the court have been filed. It [illegible] the practice of appealing cases [illegible] all other matters governed by rules

would be in a chaotic condition.

The motion of plaintiff to strike the report of the proceedings at the trial is allowed and the report stricken. And since all the errors complained of are predicated upon the report of the proceedings, there is nothing that we can pass upon, and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

40544

CORRIE M. STRIBLING, Appellee, vs. THOMAS L. GRACE et al.	)	APPEAL FROM CIRC. CT. KOBAT COUNTY.
Appeal of JOHN F. KENT, Appellant.	)	301 I.A. 600

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING
BY MR. PRESIDING JUSTICE MATCHETT.

The majority of the court adhere to their decision that the report of proceedings must be stricken. The writer dissents. However, the court has given consideration to the appeal upon the merits. We are agreed the record does not disclose reversible error. This opinion is filed for the two-fold purpose of stating the views of the court on the merits of the appeal and the reasons which constrain the writer to dissent from the decision striking the report of proceedings.

Defendant argues the evidence was insufficient to support the judgment; that he was prejudiced by erroneous instructions given for plaintiff and refusal to give proper instructions requested by defendant; that remarks of the trial Judge were prejudicial; that improper evidence was admitted and proper evidence excluded; that the judgment was vitiated by a material variance; that the verdict was a compromise verdict contrary to law; and that defendant was deprived of his right to poll the jury.

The principal facts are accurately stated in the original opinion and need not be repeated. Some of the points do not require extended consideration. The record shows defendant's right to have the jury polled was waived by an instruction given (by agreement of the parties) that a sealed verdict might be returned with leave to the jury to separate. As to the compromise verdict, we hold defendant has no reason to complain because the judgment

was less than it should have been. The point of variance was not raised in the trial court. It cannot be urged here. The remark of the Judge complained of was made in the examination of an expert witness. The Judge said, "Let him answer. After all he is an expert." The witness had qualified as an expert. Defendant's attorney in the trial spoke of him as an expert. The remark was not prejudicial.

Of defendant's points there remain for consideration whether the evidence is sufficient to sustain the judgment, including the question of whether the court erred in rulings on admission and exclusion of evidence; and whether there is reversible error in instructions given and refused.

Defendant earnestly contends the evidence is insufficient to support the judgment. He says (citing Bright v. Peabody Coal Co., 290 Ill. App. 110, and Krankowski v. Chapo, 268 Ill. 183) it was necessary for plaintiff to allege and prove each element of her cause of action. This is undoubtedly true. The complaint states the notes were represented to be sound and valuable securities and the collateral securing the same more than ample to secure their payment. ~~Plaintiff~~ Defendant says there is no evidence that either representation was made. It is true the proof does not show representation in the precise words of the complaint, but this was not necessary. There was abundant evidence from which the jury could reasonably find the representations as stated in the complaint were in substance made. Defendant says the representations that the securities were valuable and the security therefor ample were statements of opinion merely, and that no action in fraud and deceit could be based thereon. It must be remembered the subject matter of the transaction of which complaint is made was negotiable securities. These securities were described as "six per cent collateral gold notes." The notes by their terms were to mature in one

year from the date of issue and about eight months after this transaction of sale. Such securities now could not be sold without compliance with the provisions of the Blue Sky Law. At the time of issue, however, notes to mature in one yearwere Class "A" securities as notes to mature in six months now are. (Smith-Hurd Ann. Stats., chap. 121½, sec. 99 (1c), p. 362; and Historical note, p. 634.) These notes were the obligation of the Southern Indiana Consolidated Utilities Corporation, a holding company organized under the laws of Delaware, whose assets consisted of the common stock of two operating companies in Indiana. Defendant was an officer and director in the holding and operating companies, president and director of Kent, Grace & Company, the broker corporation which underwrote the notes and issued the prospectus upon which the notes were sold to the public.

The original issue of notes was for $850,000 face value. The issue was made February 15, 1930. The sale to plaintiff was on July 10, 1930, for 99 1/2, as per the prospectus issued by Kent, Grace & Company. This prospectus is in evidence. It states that the consolidated earnings of the two constituent companies for the twelve months ending December 31, 1929, "after giving consideration to rate increases <u>now in effect</u>" were: Gross income, $477,872.50; Operating expenses and taxes, $297,783.70; Net operating income, $180,088.80; leaving a net income "before depreciation" of $85,412.89, which (said the prospectus) was 2.81 times the interest charges on this issue of gold notes. This prospectus goes on to say: "The information and statistics contained in this circular are not guaranteed, but have been obtained from reliable sources and we believe them to be accurate." On the face of each note was a statement that no recourse might be had by the holder against stockholders, present or future, or officers or directors of the company by virtue of any statute.

A careful perusal of the prospectus or circular gives the impression that it is well designed to deceive an unsuspecting purchaser. In Tone v. Halsey, Stuart & Company, 286 Ill. App. 169, we held similar statements to amount to a representation that the statements made in the circular as to the earnings, etc., were true. The evidence here shows that the statements of the circular were untrue. The interest on the notes was not paid. Default was made in both principal and interest at maturity about seven months after this sale. The trustee sold the collateral securing the notes. The only bid made for it was in behalf of defendant who purchased it for $200,000. Plaintiff in that proceeding received $9,835.5 for her $25,000 investment. When the circumstances are considered, the short time elapsing between the sale and default, defendant's relationship with the several companies, his active interest in financing them and his relationship to the concern through which the sale was made, it would seem the jury was justified in finding that defendant well knew these notes were merely speculative securities.

Defendant was called as a witness and testified that he knew when the notes were issued that the interest to become due could not be paid unless the loan was refunded. As a matter of fact, the income from the corporations applicable to the payment of interest was not 2.81 times the annual amount of the interest, as the circular stated. The report of the Decatur company to the Public Securities Commission of Indiana for the year 1929 showed no dividends were earned or declared. The Southern Indiana Company in that year increased its mortgage debt by $10,623.43, bringing it to a total of $1,153,500. In the previous year of 1928, it operated at a loss of $33,793.72, and in 1929 at a loss of $56,120.33. On September 23, 1929, as defendant knew, the holding company made a loan to the Southern Indiana Company of $39,513.78 to enable it to meet interest on an outstanding mortgage. The Decatur company in 1929 made a net

income of only $9,077.57. As to the Southern Co. Company defendant testified: "The amount of that loan was outstanding and owing to (by) that telephone company in addition to the amount of its first mortgage bonds outstanding, and also in addition to the preferred stock carrying seven per cent interest, which were all obligations due and owing by that Indiana company before the declaration of dividends on its common stock held by the holding company." Defendant said he did not know whether the operating company paid a dividend which would enable the holding company to pay the rent on these notes. He explained the operating companies would pay a management fee to the holding company. He did not say such fee was in fact paid, nor explain how in their then financial condition these companies could have been paid any such fee. We hold there was abundant evidence from which the jury could reasonably find these notes were represented to be safe and sound and the security therefor ample, as the complaint averred; that these representations were known to be false or were made with reckless disregard of their falsity, with intention to deceive the purchasers; that plaintiff relied on these representations and was deceived to her damage. This would seem to be sufficient. It has been so held in similar cases which we shall not undertake to discuss at length. (Douthit v. Swiney, 310 Ill. 180; Koll v. Peterson, 336 Ill. 5-2; Pustelniak v. Villman, 359 Ill. 270; Puttitta v. Lawrence, 346 Ill. 164.)

In this connection it is contended the court erred in permitting a certified public accountant to testify over defendant's objection in explanation of the report of the operating companies to the Public Service Commission of Indiana, these reports being in evidence. It is said the court permitted this witness to testify whether the books showed a profit or a loss, and to give his opinion as to ultimate findings. It is urged this is prejudicial

error. Smythe's Estate v. Evans, 204 Ill. 376; Yerber v. Chicago & Alton Ry. Co., 235 Ill. 589; Shepre v. Jenison, 234 Ill. App. 98. We have carefully examined the evidence of the accountant and think it was admissible in order that the jury might have an intelligent view of the meaning of the documents in evidence. People v. Gerold, 265 Ill. 448.

As to instructions, defendant makes two general complaints. First, proper instructions offered by him were refused; second, improper instructions offered by plaintiff were given.

Defendant complains of the first instruction given at plaintiff's request which told the jury that if defendant was an officer and director of the operating companies at the times when these companies prepared and filed with the Public Service Commission of Indiana their annual reports (copies of which were in evidence) defendant was presumed to know what was contained in these reports. Defendant says that it was admitted by Kent in his pleadings and in his evidence that he was an officer and director of these companies, and that the instruction was erroneous in assuming that the companies prepared their annual reports and that the same were correct. To the first point Merritt v. Boyden, 191 Ill., 136, is cited. To the second, Clark v. Public Service Co., 275 Ill. App. 426. We think the instruction accurately stated the law applicable. Johnson v. Canfield-Swinart Co., 292 Ill. 101; Moody v. Chicago Title & Trust Co., 126 Ill. App. 68. Defendant is mistaken when he says the instruction assumed any matter in issue. There was no controversy or issue either as to the fact of Kent being an officer and director in each of the corporations, or as to the accuracy of these reports. Knowledge of both matters was peculiarly within the control of defendant. Defendant was not prejudiced by the instruction in any way and it would not confuse an intelligent jury.

Defendant complains of the second instruction given at

plaintiff's request by which the jury was told that if the gross and net income of the telephone companies as stated in the prospectus were false in fact, and if plaintiff by her agent relied on such statements and purchased the notes upon the representation that these things were true, then it was not a defense available that plaintiff or her agent or both were negligent in not determining the veracity of the figures otherwise unless there were circumstances arising in connection with the purchase of the securities which would require plaintiff in the exercise of ordinary care or caution to investigate. Defendant complains that the phrase "underlying or operating telephone companies" is vague and fails to identify the defendant with the companies; also that the instruction singles out the element of falsity and emphasizes it unduly; further, that the phrase "purchase the said gold notes" assumes a fact which was an issue. There was nothing vague in describing the corporations as "underlying" and "operating" companies. The evidence described them as such many times, and the attorneys must have substantially described them in this way in their arguments to the jury. Again, we must assume an intelligent jury. The prospectus was in evidence. It used the phrase "subsidiary companies" in describing the corporations in question. The instruction was substantially correct as to the law applicable. Hoffner v. Reinberg, 296 Ill. App. 13; Leonard v. Springer, 197 Ill. 532; and Pustelniak v. Villmas, 352 Ill. 270. The alleged falsity of the representations made was not unduly emphasized. The case was one for fraud and deceit. Nor is there any real controversy or doubt that the transaction in which plaintiff took the notes was a purchase, as distinguished from a barter and exchange.

Complaint is made of the third instruction, which told the jury in substance that when a corporation issues a prospectus containing information as to gross and net income, assets, etc., of

one or more corporations whose securities are offered for sale by the prospectus, and the public directly or indirectly solicited to purchase the securities so offered, the public is entitled to presume the prospectus was issued with the assent of the officers and directors, and that it contains a true statement of important facts as to the financial condition of the company whose securities are offered. It is objected that the transaction is again designated as a purchase and that the instruction does not contain all the essential elements of an action for fraud and deceit. However, the instruction did not direct a verdict. It was, therefore, not necessary that it should include all such elements.

Complaint is made of the fourth instruction, which told the jury that if it found and believed Kent, Grace & Company, of which defendant was vice-president and director, issued the prospectus and plaintiff was thereby solicited and relied on the matters therein stated and purchase the securities, the plaintiff and her agent were entitled to presume that the prospectus contained a true statement "of the important facts" therein stated with relation to the financial condition of the company whose securities were offered. It is again objected that the word "purchase" is used and complaint is made of the phrase "important facts". It is said the instruction by the use of the phrase "if you further find that the plaintiff, by her agent, by said prospectus was directly or indirectly solicited to purchase" was prejudicial. The question of solicitation, defendant says, was in issue and is not an element of fraud. The record, we think, does not sustain this contention. The only purpose of the prospectus was to induce plaintiff and others to buy these notes. That would seem to amount to solicitation.

Complaint is made of the fifth instruction, by which the jury was told that although Kent did not personally participate in the sale, if it should find that at and before the issuance of the pros-

pectus defendant was an officer and director of the different companies, and if it should further find from a preponderance of the evidence that the information contained in the prospectus with reference to the financial condition of the "underlying or operating telephone companies" was in fact false and made for the purpose of inducing members of the public to purchase them, it would be proper to find that defendant was personally responsible for the publication and circulation of the information contained in the prospectus. Defendant complains that the instruction is argumentative, indicates the opinion of the court on the case, and that in commencing with the phrase "although we find" is reversibly erroneous, citing South Chicago City Railway v. Dufresne, 202 Ill. 456. In the case cited an instruction somewhat similar in form was criticized but was held not harmful or reversibly erroneous. Defendant also says that the use of the word "personally" was prejudicial, as was the phrase "then it would be proper," and it is urged that for these reasons the instruction in effect directed a verdict and was therefore erroneous in not including all the necessary elements. Adamson v. Magnelia, 286 Ill. App. 412. We do not think the instruction is subject to this criticism nor that in effect, either in form or in substance, it directed a verdict. The case cited is therefore not applicable.

The sixth instruction is criticized for the form of the special finding submitted to the jury. An amendment of the record has been filed. We think the instruction as to form complied with section 65 of the Civil Practice act. (Smith-Hurd Anno. Stats., chap. 110, par. 189, p. 558.) Complaint is made of the definition of "malice" as therein stated. The definition is, we think, sustained by the well considered cases of Jernberg v. Mix, 199 Ill. 254, and In re Petition of Blacklidge, 359 Ill., 482.

We have pointed out our conviction that the verdict of the jury is justified. The complaints against the instructions are

hypercritical. Under the circumstances we are not disposed to reverse in the absence of clear prejudicial error. Defendant complains that the court refused to give nine of the instructions requested by him. We hold the court did not err in this. Some did not state the law clearly; others, while correct, were already covered by instructions given. The court is of the opinion that the verdict of the jury has finally settled all questions of fact in favor of plaintiff and that the verdict could not properly have been other than for plaintiff. We therefore agree the judgment must be affirmed.

The writer dissents from the decision of the court that the report of proceedings shall be stricken. October 26, 1938, plaintiff made her motion in this court to strike the report, which on November 4, 1938, we denied. I think we should adhere to the decision then made and for two reasons. In the first place, if I understand aright Ross v. Meyer, 370 Ill. 166, the procedure upon appeal is to be determined according to the rules of court in effect at the time of the actual entry of the judgment. At the time of the actual entry of this judgment (July 11, 1938) the amended rule limiting the time for filing a report of proceedings to 50 days was not in effect. It would not go into effect until August 1, 1938. In the second place, I think a proper construction of the rule gives to the court discretion as to whether this report of proceedings should be stricken, and I think that discretion should have been exercised in favor of defendant to the end that the appeal might be heard on its merits. It is true that paragraph "C", Rule 36, as amended directs that the report of proceedings shall be filed within 50 days. The penalty for failure to comply is stated in paragraph "E" of the rule, and this is stated to be that the failure to file authorizes a dismissal. I do not regard this provision as mandatory. It grants to the court power to

compel speedy compliance with the rule, and that the reviewing courts can be trusted to exercise their discretion to the furtherance of justice. I cannot agree with the dissenting opinion that by such interpretation "the whole procedure might be disrupted and the fifty day period mentioned in the rule would be meaningless." The whole spirit of the Civil Practice Act, and rules, is against the interpretation which the majority puts upon this rule. Smith-Hurd Anno. Stats., Chap. 110, par. 2-1, Civil Practice Act, sec. 76[illegible].

40502

LOUIS J. BOROWSKY,
Appellant,

vs.

WERNER A. WIEBOLDT et al., LLOYD O. GILBERT, Defendant, LAKE VIEW TRUST AND SAVINGS BANK, Garnishee,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

301 I.A. 001

MR. PRESIDING JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff judgment creditor from an order entered in a garnishment proceeding discharging the garnishee. The judgment dector was Lloyd O. Gilbert. At the date of service of the garnishment writ at 11:30 a. m., June 25, 1938, Gilbert had three accounts in defendant bank. From two of these accounts all the funds were withdrawn on the morning of the day of service, and before service. The third account was carried in the name of "Lloyd O. Gilbert, Trustee and Receiver." On the morning of the day of service this account showed a balance in favor of the depositor of $11,294.40. Only $350.87 of this account was left in the bank at the actual time of service, 11:30 a. m. The answer of the Bank states that this was a checking account carried by defendant Gilbert as "Trustee and Receiver," and it denies that it owed Gilbert anything personally. Gilbert also filed a petition setting up that the money in this account was not his own but was trust property held by him for others. Plaintiff answered denying the statement of this petition. The court heard evidence. The plaintiff called the employees of the bank and Gilbert as his witnesses. Gilbert was not asked whether the money in this account belonged to him or to someone else. The court discharged the garnishee.

Plaintiff argues that the burden was cast upon Gilbert to prove the matters averred in his petition, and since no evidence was offered on that point the terms "trustee and receiver" are to

be regarded merely as descriptio personae, and the money in the account must be regarded as due to Gilbert personally. The argument is not justified by the record. The matter came on for hearing upon the answer of the garnishee to interrogatories filed by plaintiff. These answers were to the effect that there was nothing whatever due from the Bank to Gilbert at the time of service of the writ. The burden of proof was upon plaintiff to overcome the answer of the garnishee irrespective of any issue raised by the supplemental petition. Payne v. Chicago, R. I. & P. R. Co., 170 Ill. 667; Bartlett wpd King v. Willis Mfg. Co., 106 Ill.App.248; Jarecki Mfg.Co. v. Bailey, 163 Ill. App. 399; Harris v. Montag, 247 Ill.App. 89; Laschear v. White, 58 Ill., 43; Reid Murdoch & Co. v. First Nat'l Bank of Chicago, 135 Ill. App. 49.

Plaintiff cites Young v. First Nat'l Bank of Cairo, 51 Ill. 73, and Mulligan v. Alsen, 222 Ill. App. 615. These cases hold that the word "agent" added to the name of a depositor is merely descriptio personae, and that is undoubtedly true; but we think the words "trustee and receiver" are more than mere description, indicating the character of ownership of the funds in the bank. This, at any rate, is established prima facie by the use of these words supplemented by the answer of the Bank denying it was indebted to the depositor personally at the time the writ was served. The petition of Gilbert and plaintiff's answer did not change the issue, which was between plaintiff and the garnishee. It did not shift the burden of proof, which was on plaintiff.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

40526

KATHLEEN E. MOSELEY,
Appellee,

vs.

ALEXANDER MOSELEY,
Appellee.

J. KENT GREENE,
(Respondent) Appellant.

) APPEAL FROM SUPERIOR
) COURT OF COOK COUNTY.

301 I.A. 692

MR. PRESIDING JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal originally was from an order entered July 9, 1938, and a further order entered July 11th thereafter, denying respondent's motion to set aside the order of July 9th. After the record was filed in this court the respondent by leave of court upon his petition, under section 76 of the Civil Practice act, (Smith-Hurd Anno. Stats., chap. 110, par. 200, pp. 181-82) was given leave to appeal from other orders entered November 24, 1937, December 10, 1937, March 4, March 9 and April 21, 1938. The order of July 9th, which will be later described, cannot be understood without a short history of the complicated litigation disclosed by this record.

The original suit was begun February 27, 1935, by Mrs. Kathleen Moseley against Alexander Moseley, who, her complaint charged, was hired by plaintiff to manage a business in Chicago of which she was sole owner. The complaint averred that Moseley in full compensation for his services was to receive one-half the net profits of the business; that he first mismanaged the business and afterward claimed to own it. The complaint prayed for an injunction, an accounting, a decree for ownership of the property with judgment against the defendant at law for $100,000.

Plaintiff was represented in that litigation by Newell Mecartney, her attorney; defendant by his attorney, the respondent,

J. Kent Greene. Plaintiff made a motion for a preliminary injunction. May 16, 1935, the cause was referred to a Master. Pending the reference Mrs. Moseley, plaintiff, presented her petition for rule on defendant and Greene to show cause why they should not be punished for contempt of court for violation of an oral order of the Judge and an oral agreement of the parties made, as she averred, in open court, that the property would be held in statu quo pending the litigation. She averred $600 had been paid by defendant to Greene in violation of the oral order and the oral agreement. Defendant Moseley answered the petition under oath, denying its averments and asserting that the $600 was turned over to Greene in 1934 before the suit was filed, in payment for attorney's fees then due Greene. May 21, 1935, Judge Sabath after a hearing entered an order that Greene "hold as escrowee all moneys, properties, goods or chattels paid or delivered to him by defendant, which were the proceeds, assets, profits, accounts or otherwise, of the business herein, subject to the further order of court." This order further provided that defendant, Alexander Moseley, his attorney, etc., be "enjoined and restrained from disposing, selling, mortgaging or encumbering the title to any of the assets of the business" until further order of the court, "except the usual transaction of business and the buying and selling of goods and the payment of current bills."

June 7, 1935, plaintiff filed an amended complaint in which, for the first time, she alleged defendant was her husband, charged he has deserted her and prayed for separate maintenance. January 22, 1937, while the separate maintenance suit was pending, the Master in Chancery filed his report in the original suit. The report held defendant was the sole owner of the business; that plaintiff had no interest in it. Plaintiff's exceptions to the report were overruled by the Chancellor, and on January 22, 1937, (the same day

the report was filed) Judge Fardy entered a decree as recommended by the Master. It found Alexander Moseley to be the true owner of the property; that plaintiff had no interest in it. From this decree no appeal has been taken.

On the same day, January 22, 1937, Marjorie Brandt, who by leave had intervened and filed a cross-bill claiming to own a chattel mortgage on the business and fixtures, was granted a decree of foreclosure, and on July 15, 1938, plaintiff (Mrs. Moseley) was granted a decree of separate maintenance by Judge Stanton, with alimony of $150 a month and solicitors' fees amounting to $220. Although the original petition of Mrs. Moseley to have her husband and his attorney held in contempt was dismissed after entry of the decree of January 22, 1937, the rule against Greene, as respondent, to show cause seems to have been kept alive and continued from time to time, although this was wholly inconsistent with both the decrees entered January 22, 1937. An order of November 24, 1937, found that respondent in his answer had set forth no defense to the rule to show cause for his failure to pay the clerk of the court $600, and a motion by him for leave to file an answer was denied. He was ordered to pay the clerk $600 within five days. December 8, 1937, an order was entered that respondent having refused to deposit $600 with the clerk as ordered on November 24th, should again show cause on December 10th why he should not be adjudged in contempt. December 10, 1937, respondent answered the rule, verified the answer and presented it in support of a motion in the nature of a writ of error coram nobis. In this answer he averred that the order of May 21, 1935, was illegal and unconstitutional and took property from him without due process of law, etc. In support of the motion respondent set up that errors of fact caused the entry of the order of May 21, 1935, that of November 24, 1936, and November 24, 1937. The error of fact in entering the order of May 21, 1935, was

averred to be that the court supposed it was entered in the separate maintenance suit, whereas it was in fact entered in the suit to determine the ownership of the property and business. This answer also averred that the order that respondent hold the money in escrow "until the further order of this court" should be interpreted as having been released by the decree entered January 22, 1937, finding defendant to be the owner of the business. He therefore moved that the order of May 21, 1935, be vacated.

On the same day Judge Lupe entered an order finding respondent guilty of wilful contempt for failure to deposit the money. A mittimus was issued directing the respondent to be taken into custody of the sheriff and committed to jail for a period not to exceed six months. On the same day the sheriff seized respondent and the $600 was paid to the sheriff. On the same day (April 21, 1938) the Moseleys (plaintiff and defendant) joined in a petition that a stay of mittimus for commitment of respondent for contempt be terminated and that the clerk issue instanter mittimus for commitment of respondent as provided in the order of December 10, 1937. This petition was heard by Judge Stanton and the order of July 9, 1938, appealed from, was entered by him. It found respondent violated an order of court in collecting $600 from defendant, ordered the $600 (which theretofore by order of court had been turned over to the sheriff) distributed to attorneys for plaintiff and to the plaintiff. The order then directs that defendant and respondent settle their accounts in another forum.

This order manifestly is entirely inconsistent with the two former decrees entered January 22, 1937, the one determining Alexander Moseley's right to the property in litigation, and the other that this right was subject to the chattel mortgage of Marjorie Brandt of which foreclosure was granted. As a matter of fact, Alexander Moseley by his sworn answer in response to a sworn pleading of

plaintiff had theretofore denied every material fact on which this order of July 9, 1938, is based. The petition upon which plaintiff first asked respondent to be held in contempt had been dismissed. If the court had jurisdiction, which is doubtful, the order was clearly erroneous and contrary to right and justice. It is apparent the fact that three causes of action were prosecuted in one proceeding caused confusion.

The orders of November 24, 1937, December 10, 1937, March 4, March 9, and April 21, 1938, and July 9, 1938, are reversed.

ORDERS REVERSED.

O'Connor and McSurely, JJ., concur.

40537

RAYMOND E. KORZENIEWSKI and SUSAN F. KLARKOWSKI, (Plaintiffs) Appellants, vs. HARRY J. KORZENIEWSKI et al., Defendants. HARRY J. KORZENIEWSKI and IRENE J. KADOW, individually and as surviving Trustees under the Last Will and Testament of Joseph Korzeniewski, deceased, and Z. H. KADOW, (Defendants) Appellees. BERNARD J. KORZENIEWSKI and ARTHUR L. KORZENIEWSKI, (Defendants) Co-Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

301 I.A. 602

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs Susan F. Klarkowski and Raymond E. Korzeniewski, in which defendants Bernard J. Korzeniewski and Arthur L. Korzeniewski join, from a decree entered July 15, 1938, settling the accounts of the Trustees under the last will and testament of Joseph Korzeniewski. The decree approved the accounts with certain exceptions. The original complaint was filed by Raymond E. Korzeniewski and Susan F. Klarkowski, heirs at law and legatees of Joseph Korzeniewski, deceased.

February 17, 1929, Joseph departed this life leaving a last will and testament executed by him on January 19, 1926. The will was admitted to probate. After payment of debts and provision for certain specific bequests of property to his wife, Anna J. Korzeniewski, the will devised all the residuary estate to the wife, the son, Harry J., and a daughter, Irene Kadow, as Trustees, with full power to hold, manage, sell, mortgage, etc., the entire net income of the trust estate to be paid to the wife Anna in installments during her lifetime, at her death the trustees to divide the estate into as many parts as he had children living, and deliver one share to each child. In case any child was not

living but left descendants, such descendants were to share in the distribution in case they should have reached the age of 21 years. The wife, Anna J., the son, Harry J., and the daughter, Irene Kadow, were named as executors as well as trustees without bond.

Joseph Korzeniewski at the time of his death was the owner of and conducted a wholesale flour business in Chicago. Upon his death the executors qualified, took possession of the estate and administered it. It was declared closed and the trustees came into possession of it January 17, 1930. At the time of his death the testator left his surviving his wife, Anna J., his sons, Raymond L., Harry J., Gregory M., Bernard J. and Arthur J., and his daughters, Susan F. Klarkowski, Harriett . Krawiec and Irene J. Kadow. The wife, Anna, departed this life March 31, 1937, testate, and upon her death, by the terms of the will the trust estate came to an end and the beneficiaries are now entitled to distribution.

The inventory filed in the probate court shows an estate at the time of the death of Joseph Korzeniewski amounting to about $255,428,83. The flour business has been conducted by the trustees, directed for the most part by the son Harry J., who was employed in the business prior to the death of his father. Mrs. Kadow's husband is Z. M. Kadow, an attorney-at-law, and he has acted as counsel for the trustees. The two younger sons lived with the mother, and the mother's influence seems to have been persuasive over her family, with the exception that soon after the death of the father Mrs. Klarkowski assumed a hostile attitude and usually did not take part in the family conference often held in the home of the mother.

The net value of the flour business as of the date of the death of Joseph Korzeniewski was $67,804.55. The testator held stocks at that time of the market value of $109,210.75, bonds to the market value of $99,687.50, mortgages of a value of $16,170. The net value of the estate was about $295,428.83. The testator

death of Joseph [illegible] stocks at that time on the market [illegible] the market value of 200,000, [illegible] The net value of the estate was about $[illegible]. The testator

held stocks in five Chicago banks, all of which were closed while the administration of the estate was pending in the Probate court. The bank stocks became worthless and the liabilities of the estate as stockholder were settled by the executors. Among other stocks belonging to the estate were 25 shares of National Electric Power Company Preferred, 50 shares 7% Prior Lien Chicago North Shore & Milwaukee Railroad, 50 shares 7% Prior Pref. Midland Utilities, 59 shares Common Stock Middle West, 15 shares Middle West Preferred, 57 shares Preferred Middle West Utilities Company, 50 shares 8% Prior Lien of Middle West Utilities, 5 shares 5½% Prior Pref. stock of Insull Utilities Investment, Inc.

The management of the estate was to a certain extent a family affair, and the administration of it seems to have been the subject matter of frequent family conferences in which the influence of the mother was predominant. Almost fro the first Mrs. Klarkowski seems to have objected to the administration, and she early ceased to attend these family conferences personally but was at times represented by her attorney, Mr. Swissler. January 14, 1932, when the executors filed their amended final account Mrs. Klarkowski filed objections specifying the purchase by the executors of certain specific securities. October 4, 1934, the Probate court entered an order sustaining these objections and surcharged the executors with the amount expended, namely, $12,480.36. This order also found the executors had failed to set aside from the income derived from the operation of the business a balance of $7,909.26, which was lost in the closed North Western Trust and Savings Bank, and that this amount had been paid out to the mother. March 22, 1935, the petition of the executors for additional fees for themselves and their attorneys was denied by the Probate court.

The mother, Anna J. Korzeniewski, at her death left a last will and testament dated May 20, 1932. The will does not

indicate any unkind feeling toward any of her children. After certain bequests to religious charities the will leaves $8000 to Arthur L. to be used in the furtherance of his education and to be charged against the real estate. To Irene Andow and Harry and Bernard she devised the remainder of her real estate, to be sold and net proceeds to be divided equally among the surviving children; to her sons, Arthur L. and Bernard J., or their survivor, all her residuary personal property, with directions to distribute and divide it among their surviving brothers and sisters. She appointed her sons Bernard J. and Arthur L. executors.

The objections to the account of the trustees, originally 21 in number, have been reduced to 7, to which we will give separate consideration.

The first claim is that by reason of the negligent failure of the trustees to sell certain "Insull securities," so-called, they should be surcharged with the loss sustained, which it is stipulated would amount to $23,556.26. All of those securities were a part of the estate of the deceased at the time of his death. The trustees held these securities as executors from March 7, 1929, to October 31, 1931, and thereafter as trustees up to March 31, 1937, which was the date of the death of Anna J. Korzeniewski. Paragraph 1 of Clause 3 of the will provides: "* * * Said Trustees may retain, as a portion of said trust estate, any investments received by them from my estate, and are also hereby fully authorized to invest such part of said trust estate as may from time to time be converted into cash in bonds, stocks, real estate mortgages or in any other income producing property or securities my Trustees may select." Certain exchanges of these stocks were effected during the executorship, which are, we think, unimportant. The objectors point out that from December 31, 1930, to April 30, 1931, the market price of these stocks remained practically stationary; that from April 30, 1931, to October

31, 1931, they declined in value about 40%; that between October 31, 1931, and March 31, 1937, these stocks became practically worthless, having shrunk from a value of $24,442.61 to a total value of $775.35, showing a total depreciation of $23,667.26, for which it is asked the trustees be held liable. The objectors point out that the executors from February 17, 1929, to October 21, 1931, had been in possession of the estate and were therefore acquainted with it; that bank stocks of the supposed value of $55,350 had at that time become not only worthless but the basis of a liability against the trust estate; that real estate bonds of the appraised value of $45,000 by April 30, 1931, had become of an undetermined value, and that these Insull stocks had declined in value from $40,031.79 to $24,442.61. The trustees, it is said, knew of the declining value of these securities yet made no effort to dispose of them. In other words, the objectors say the trustees sat idly by and watched the assets of the estate dwindle without taking action to recuperate or check the loss. The objectors quote Bogert on Trusts and Trustees. sec. 684; Perry on Trusts, sec.465. They also cite In Re Jarvis Estate, 180 N. Y. Supp. 324; In Re Frank's Will, 208 N. Y. Supp. 244, and Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86. In this last case the Supreme court said:

"The trustees must always and ever, in exercising their powers, act in the utmost good faith and with sound judgment and prudence."

In section 684 Professor Bogert says:

"If a trustee is authorized by the settlor to retain securities held by the settlor, this permission is not absolute. It is qualified by an implication that the trustee will be protected in the retention, unless it becomes very apparent that it will be disastrous to keep the investments."

As already pointed out, these stcoks concerning which negligence is charged, were known as Insull securities. The records of this court and other courts are filled with the names of persons prominent in the business life of Chicago, bankers, investors, public

officials, who became and remained owners of these stocks to their great regret. It is now easy to see how foolish it was for them to do so. But the liability of the trustees for negligence must be considered from the standpoint of things as they appeared to reasonably prudent persons before rather than long after the happening of the event. Few better illustrations of the ancient proverb that "hindsight is better than foresight" could be found.

We do not deem it necessary to go into the evidence in detail. In the first place, these securities had been purchased by the father on whose good judgment the family would quite naturally rely. The testimony of Bernard Korzeniewski undoubtedly accurately states the situation. As the Insull securities fell there was a general feeling that they could not fall lower; that the worst had passed, and that these securities would come back. So the business community generally felt until, as Bernard said, "I woke up one morning and the paper said it was all defunct." These trustees had just as much interest financially in these securities as did the other beneficiaries of the trust. They did not wish to lose their money any more than the objectors wished to lose theirs. Most solicitous of all would be the mother whose interest in and loyalty to her family are disclosed by this whole record. She was, during her lifetime, the dominating influence in the family affairs, and it is impossible to think of her as negligent. If any of the beneficiaries seriously desired the sale of the securities, it would seem a request in writing would have been made. The failure so to request (especially on the part of Mrs. Klarkowski) goes very far to sustain the view that there was acquiescence of the whole family in the course which the trustees pursued. The trustees have not received compensation for their services. As they point out, a receiver of the property of the estate, appointed on the motion of plaintiffs upon the filing of this complaint, has received fees of $2000 for

one year's services on the motion of objectors. The trustees have not profited in any way by the retention of these securities. There is no claim of fraud against them. The cases upon which the objectors rely are distinguishable. In Re Jarvis, 180 N.Y. Supp. 324, in that the question there was the acquisition of securities by the trustees rather than the failure to sell; In Re Frank's Will, 208 N. Y. Supp. 244, where the only question involved was the construction of a will; and Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, is a mere dictum of the Supreme court. Professor Bogert says in Bogert on Trusts and Trustees, sec. 683, p. 2051:

"Trustees are often authorized by the settlor to retain part or all of the investments made by him and transferred by him to the trustee. Such clauses are of undoubted validity in protecting the trustee in holding the investment mentioned, at least in the absence of very clear evidence that the retention is to have disastrous consequences."

It must be remembered also that the question for this court upon the record is, whether the Chancellor, who saw and heard the witnesses, has made a finding clearly and manifestly against the weight of the evidence. We cannot say he has done so.

Z. H. Kadow, husband of Irene Kadow, is an attorney-at-law. After this litigation began the trustees paid to him the sum of $10,000 in cash and government bonds for services said to have been rendered by him to the trust estate. The Chancellor made a total allowance to Mr. Kadow of $4466.25, and required him to repay to the estate the difference between the amount allowed and the payment made. June 10, 1937, Mr. Kadow rendered a statement to the surviving trustees covering services as attorney for them in 13 specific matters, in which the fees amounted to $1890 and costs and expenses which had been advanced by him amounting to $76.25, a total of $1966.25. No substantial objection is made to these two charges. The third charge presented was for alleged services rendered from November 3, 1931, to June 9, 1937, and covered nearly 200 items, for which he asked compensation to the amount of $13,000. The

Chancellor allowed $2500 for these services, making a total allowance of $4466.25. The objectors contend that Mr. Kadow never intended to make any charge for these "general items", as they are called, and assert that the services were of no value to the estate, that some of the services might well have been performed by the trustees themselves, that the memoranda offered in support of this general claim was unreliable, etc. Mr. Kadow testified at length as to the services rendered by him. There is no question that he acted as attorney for the trust estate, and it is clear that whatever legal services were performed for these trustees up to the time Mr. Love was employed (which will be considered in another item) were performed by Mr. Kadow. His office apparently was not well organized and his books of account were not carefully kept. He is not the only lawyer of whom this might be said. We think the Chancellor did not abuse his discretion in this allowance. His reasons are well stated in the record - "Well, I have already stated, but so there will be no question about it I will repeat, that it is my belief that there were no accurate records kept of the work that this attorney did. Like many others in the practice, and a lot of good lawyers, they do not keep track of the time they spend in various litigations; and then when the Probate court or some other court wants a statement of the time they hurry around and scratch their heads, and make up what they think is a list. That is about what happened in this case. A part of it is correct; a part of it is not. * * * I do not believe that there is any dishonesty; whatever you may say about this lawyer, you cannot say that he is dishonest; I do not think that there is any dishonesty in his make-up. I think he is honest, absolutely; but that is the order of the Court." An extended discussion would serve no useful purpose. The question here is whether the finding of the Chancellor is against the clear and manifest preponderance of the evidence. We cannot say

the clear and manifest preponderance of the evidence. We cannot say

it is.

The third item complained of is the allowance of $750 of the sum paid by the trustees to attorney Stephen Love, after the complaint in this case had been filed, for his services in behalf of the estate. Mr. Love testified that when paid he informed the trustees that they would have no right to pay him out of the trust estate for services rendered in a controversy between the beneficiaries. The complaint had been filed six days prior to the payment. The services of Mr. Love were directed toward securing a distribution in kind of the assets of the estate, which would have saved much expense and litigation. After conferring with the trustees he called a conference of all the beneficiaries of the trust and this conference was attended by some of the counsel in this case. He prepared schedules of all the securities of the estate, arranged for the disposal of the remaining assets of the flour business (including the sale of the entire remaining stock of flour for $7500.) The trustees paid Mr. Love $1500 by way of retainer, and the Chancellor allowed a credit of one-half of this amount, or $750, as representing the amount of work performed by Mr. Love which was for the benefit of the entire estate. We think there is no error in this allowance.

Complaint is next made of the allowance to the trustees of $3,431 on account of money paid by them to customers by way of refunds on account of processing taxes collected from the customers under the Federal Agricultural Adjustment Act, which was afterward declared invalid. The payment seems to have been made on the advice of Mr. Prince of the Internal Revenue Office after the Act had been held invalid. These refunds were made to the customers by way of credits to accounts and by merchandise. It seems refunding was agreed upon at a conference of the beneficiaries of the trust, at which Mrs. Klarkowski was represented, and we think the trustees

may not justly be charged with any dereliction in this respect.

Another objection is to the allowance of a credit of $4177 paid by the trustees to Harry J. Korzeniewski for services rendered by him in conducting the business of the trust. The testimony of Harry, Irene and Raymond is to the effect that in 1932 they held a conference and agreed that there would be a temporary reduction in salary, which would be paid to them later as they needed it. Accordingly Harry's salary was reduced at first from $96 to $86 a week and later to $75 a week. Raymond's salary was reduced at the same time; he took the reduction for two weeks, then complained to his mother, by whose influence it was restored. In January, 1936, the trustees gave Harry a check for $4177, which, as a matter of fact, he almost at once turned over to his mother. It is argued this payment was arranged for because of the fact that the Probate court had surcharged the account of the mother for excessive payments made to her, and it may well be that this was one of the motives in the collection of this back salary. Harry testified his mother was "brooding and crying, and that he said, 'I will take my back salary and give it to her so we can settle the probate matter. * * * I gave my mother the $4177 to keep her peaceful.'" The testimony to the effect that the reduction was made upon the promise that it would be made up is not impeached, nor is it denied that Raymond refused to take his cut with the others. The matter was not secret. It was usual whenever a written accounting was made to furnish each of the beneficiaries with a copy, and no objection was made in regard to this until after this suit was filed and after the death of Mrs. Korzeniewski. The testimony upon the hearing was that the agreement was made in the presence of Raymond; he was present in court and did not deny the testimony. We think the ruling of the Chancellor was justified.

Among the assets of the estate appears an item of $5942 designated process taxes recoverable from flour millers. The

trustees made no particular efforts to collect these items and there is no proof that they were collectible. Harry J. Korzeniewski testified that he left the matter to the lawyers. The receiver of the business, appointed upon plaintiffs' motion, has had the opportunity to collect. There is no evidence he has succeeded. The Chancellor did not err in refusing to charge this item to the trustees.

While Harry was acting as trustee he effected a transaction for a competing flour company whereby he sold 3000 barrels of flour for which he was personally paid a commission of $300. The flour was not the kind the trustees were selling. There was nothing wrong in making the sale. Nevertheless, he was drawing a salary from the trustees for services and commissions earned by him in the flour business technically belonged to the employer. The company paid his wages. This $300 should have been turned over to the estate. White v. Sherman, 168 Ill. 583; Hand v. Allen, 294 Ill.35. The decree as to this item will be amended by disallowing this item and directing Harry J. Korzeniewski to turn over to the estate the sum of $300. So amended the decree is affirmed with costs taxed against appellants.

REVERSED IN PART, MODIFIED AND
AFFIRMED AS MODIFIED.

O'Connor and McSurely, JJ., concur.

40557

ABRAM L. MYERS, Individually and as Trustee of the Estate of Albert M. Docter, Deceased,

Appellant,

vs.

FRANNIE S. DOCTER, MARION S. DOCTER, LOUIS L. SINGER and SAMUEL E. HIRSCH et al.,

Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

301 I.A. 603

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, one of four trustees named under the will of Albert M. Docter, deceased, filed his amended complaint in Chancery for the construction of a will, for an accounting and for other relief. On motion of defendants (his three co-trustees and the beneficiaries in the will) the complaint was stricken, the suit dismissed, and plaintiff appeals.

The will is in 12 paragraphs. By the 3th paragraph the whole residuary estate is vested in the four trustees, of whom plaintiff is one. Plaintiff is not supported in his bill by any beneficiary or person otherwise interested. He is not a legatee, devisee, beneficiary or heir. Plaintiff's fellow trustees are Fannie S. Docter, wife of the settlor, Marion S. Docter, his daughter, and Louis L. Singer, the settlor's brother-in-law. These co-trustees are financially interested in the trust. Plaintiff's personal interest seems to be limited to his right, if any, to compensation for his services as trustee. His fellow trustees, so his bill alleges, have ignored him and acted in the affairs of the trust without sanction or authority from him. The 9th paragraph of the will seems to give to these trustees the right and power to so ignore plaintiff. That clause, after nominating and appointing the four persons named as executors and trustees, continues: "In carrying out any of the provisions of

this my last Will and Testament, I direct that any three of my Executors or Trustees may act jointly, and should it so happen that on any question or matter of policy which may arise during the management or life of my estate, three or more of my Executors or Trustees cannot agree, then the question or matter of policy shall be submitted to the then Judge of the Probate Court of Cook county, Ill., and his decision in the matter shall be considered as the judgment or decision of all my said Executors or Trustees."

Sub-paragraphs (c) and (d) of clause 8 of the will in substance direct the trustees to pay first one-third of the net income of the trust for the support of Marion S. Docter, and the remaining two-thirds of the net income to the settlor's wife during her lifetime, and upon her death to convey to the daughter, Marion Docter, if living, and if she is deceased then to her descendants, per stirpes and not per capita.

Mrs. Docter, the widow, renounced the will and elected to take under the statute. Upon Marion S. Docter reaching the age of twenty-seven years, the trustees distributed the entire balance of the trust estate, including real estate which the three defendant-trustees conveyed to Marion Docter by means of deeds executed for that purpose. Marion Docter was to receive one-third of the estate, and upon the death of her mother the remaining two-thirds. When the widow renounced under the will the effect of this was to accelerate the vesting of her title to this two-thirds. This is settled by Northern Trust Co. v. Wheaton, 249 Ill. 606, and Kern v. Kern, 293 Ill. 238. Under the rule announced in these cases the remainder of Marion S. Docter was not contingent but vested. The three trustees were justified in making these conveyances, (Daybill v. Lucas, 121 N. J. Eq. 143; Bascom v. Weed, 105 N.Y.S. 459; Perry--Trusts and Trustees, 7th ed., sec. 413, p. 687) nor were the trustees disqualified to act by reason of their holding a beneficial

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Executors or [illegible]

that on [illegible]

management [illegible]

trustees [illegible]

be an [illegible]

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[illegible]

[illegible]

settled [illegible]

Agra, 293 [illegible]

remainder of [illegible]

three trustees were [illegible] v. Lucas, 121 [illegible] Trusts and trustees, 72 [illegible] trustees disqualified so not by reason of their holding a beneficial

interest in the trust, (Burbach v. Burbach, 217 Ill. 547; Perry--Trusts and Trustees, 7th edition, sec. 59, p. 46.)

The bill makes defendant thereto Samuel A. Hirsch, who is acting as one of the solicitors for the defendant-trustees. The bill charges fraud, collusion, etc., but only in general terms and not with the definiteness which is necessary in cases of this kind.

The amended complaint also charges that "contentions, doubts, uncertainties and difference of opinion have arisen and exist between the parties as to construction and effect of the foregoing and other matters and as to various documents and acts hereinafter mentioned, for the settling and disposition of which the aid and advice of this court is necessary." These are statements of general conclusions rather than facts and conferred no jurisdiction on the court to construe this trust. The nub of this controversy apparently is the plaintiff's right to compensation for his services as trustee. The dismissal of this bill does not affect plaintiff's rights, if any, in that respect. These rights may be determined by the usual method. We do not pass on these rights, if any, here. There is no justification under the facts alleged in this bill for subjecting this trust to costs and attorneys' fees for the construction of a will, the provisions of which are perfectly plain to all persons interested. Strawn v. Trustees of Jacksonville Female Academy, 240 Ill. 111. A motion to strike does not admit the pleader's conclusions of law and fact. Dr. Lietzman Dentist, Inc. v. Radio Broadcasting Station W.C.F.L., 282 Ill. App. 203; Marcus v. S.S.Kresge Company, 283 Ill. App. 556.

The decree is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

40569

MONTGOMERY WARD AND COMPANY,
Incorporated, a Corporation,
Appellant,

vs.

ROBERT G. TARR.

BOSTON DENTAL X-RAY LABORATORY,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

301 I.A. 609

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Montgomery Ward and Company recovered judgment against Tarr February 26, 1937, for $202.02, caused execution to be issued thereon, which was returned unsatisfied, and March 25, 1938, caused a summons in garnishment to be issued against the Boston Dental X-Ray Laboratory. The summons was returnable on March 30. March 25th the garnishee answered that it was not indebted at the time of the service nor since; that at the time of service they did not have any property, credits, etc., of the debtor, nor since; that the debtor was the head of a family, residing with the same, and his exemptions were claimed. The answer was contested. September 12, 1938, an order was entered discharging the garnishee. This appeal is from that order.

In the report of proceedings the parties to the cause stipulated in substance and the record shows that on March 22, 1938, a verified demand in garnishment was served upon the judgment debtor at 4:15 p. m., and upon his employer, the garnishee, at 4:20 p. m.; that a summons issued on March 26th and was duly served on that day; that the garnishee-defendant filed its written answer of "no funds." Attached to this answer was the affidavit of the debtor stating that he was the head of a family, residing with the same, and claiming exemptions under the statute. At this time the debtor was employed

by the garnishee at a salary of $47.50 a week. The debtor is a brother of the president of the garnishee corporation, and one of its principal stockholders. The bookkeeper of the garnishee had complete charge of its books and records. He issued the weekly pay checks for the salary of the debtor. He was instructed and directed by the president of the garnishee to pay the debtor's salary in advance each and every week, and the bookkeeper marked each pay check given the debtor "as advance salary" on each and every week that checks were issued.

January 1, 1937, an agreement was entered into between the garnishee, through its president, and the debtor, its employee, to pay the debtor his salary, commencing on that date (and to continue until further notice) in advance. This agreement has been followed since and up to the time of the demand in garnishment. The debtor received his weekly salary in advance on each and every Saturday, for services to be rendered. On March 19, 1938, the bookkeeper paid the debtor by check of the garnishee $47.50 for the week commencing March 19, 1938, and ending March 26, 1938, inclusive. Upon the face of this check appears a notation in the handwriting of the bookkeeper to the effect that the check is for salary of Robert G. Tarr for the subsequent week. This check and other checks for the previous two weeks and one week subsequent were introduced in evidence and show the advancement of the debtor's salary up to March 26, 1938. On that date a like check was given to the debtor, dated March 26th, in payment for services thereafter to be rendered, up to and including April 2, 1938. This check was paid to the debtor by the garnishee-defendant after the service of demand in garnishment had been served upon the debtor and the garnishee, but prior to the service of summons on it.

Plaintiff contends that the manner in which the last payment was made indicates a fraudulent design to hinder and delay creditors.

He insists that transactions between relatives in such matters are more closely scrutinized than transactions between strangers, and that the agreement between the garnishee and the employee, in view of the attending circumstances, was a fraudulent transfer as against plaintiff. On this last point no authorities are cited.

Plaintiff further contends that the garnishee, by paying the sum of $47.50 to the employee on March 26, 1938, prior to the service of the summons, admitted an indebtedness in the sum of $47.50 to the employee on that date. He contends payments made by a garnishee to a judgment debtor between the time of service of garnishment demand and the time of service of garnishment summons, are an admission by the garnishee of an indebtedness to the employee, and payments thus made must be paid over again to the plaintiff by the garnishee. In support of this contention plaintiff cites Wilcus v. Kling, 87 Ill. 107; Obergfell v. Booth, 218 Ill. App. 492; Paisley v. Park Fireproof Storage Co., 222 Ill. App. 96; Hudson v. Hudson Motor Co., 238 Ill. App. 391; Baird v. Buse-Stevens Co., 262 Ill. App. 547; Burke v. Congress Hotel Co., 280 Ill. App. 493; and Walters v. Bank of America National Trust & Savings Ass'n., 69 Pac. (2d) 843. All these cases are based on Wilcus v. Kling, 87 Ill. 107, and are the cases relied on in Walters v. Bank of America National Trust & Savings Ass'n, 69 Pac. (2d) 843.

Neither the garnishee nor the debtor have appeared in this court to sustain the judgment, and on these authorities plaintiff contends that by paying $47.50 after the service of the demand, the garnishee became liable to the plaintiff for that sum less $20 exemption for the debtor as the head of a family, and asks that the judgment be reversed and judgment rendered in favor of plaintiff for $27.50. The Illinois cases cited to this point have all been considered and reviewed at length in Campagna v. Automatic Electric Co., 293 Ill. App. 437. These and other cases were there distinguished.

[illegible]

§27.50. The Illinois cases cited to [illegible] were considered and reviewed at length in Commerce v. [illegible] Electric Co., 203 Ill. App. 637. These and other cases were [illegible] distinguished.

We said:

"The Davis case and the cases following it are, we hold, controlling in the instant case. Those upon which the judgment creditors rely are not applicable and as a matter of fact do not even discuss the actual question here to be decided. We hold that under the garnishment act an employer and employee have a right to enter into an arrangement by which the sums to be paid either as wages, salary, commissions or profit allowances to be thereafter earned shall be paid in advance; that such an agreement is not fraudulent and when made and fairly and honestly carried out, payment made according to such an agreement does not subject the employer to a second payment under the provisions of the Garnishment Act, for the reason that the creditor may not appropriate to the garnishment writ that which did not exist at the time it was served."

Moreover, the cases upon which plaintiff relies are not applicable to the facts as stipulated. These are that on March 1[illegible], 1946, the wages of the debtor were paid for the week beginning on that date and ending March 26th. The demand in garnishment was served March 22nd. The summons issued on March 26th, after payment was made for the following week. Nothing was due, therefore, either at the time of the service of demand or service of the summons whether by agreement to advance or by reason of being earned. The statute, section 14, expressly provides:

"No employer so served with garnishment shall in any case be liable to answer for any amount not earned by such employee at the time of service of the writ of garnishment."

Plaintiff is apparently unacquainted with the Campagna case, which evidently was not called to the attention of the trial court.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

40577

BEATRICE KRAUS,
Appellant,

vs.

SAMUEL KRAUS,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

301 I.A. 604

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

February 4, 1929, Beatrice Kraus obtained a decree of separate maintenance against her husband, Samuel Kraus. The decree directed defendant to pay $35 a week for separate maintenance of plaintiff and their daughter Joan, then nine years of age, "until the further order of the court."

January 25, 1935, defendant filed his petition setting up that Joan became eighteen years of age January 19th of that year, and that because of this and other changes in the circumstances and situations of the parties since the decree was entered he prayed it might be altered and modified so as to relieve him from further payments. Mrs. Kraus answered the petition, denying certain allegations therein but admitting the averment as to Joan's age, and stating that she (plaintiff) did not object to a reasonable reduction.

The Chancellor took the evidence and entered an order "that the decree be modified and vacated so that the said Samuel Kraus shall not be required to pay said Beatrice Kraus $35 per week, nor any other sum, until required by order of this court." From that order Mrs. Kraus appeals.

She contends, first, that the court had no power or authority to enter the order modifying the separate maintenance decree to the extent of releasing defendant from all future alimony payments, and second, that the court abused its discretion in so modifying the decree. The first contention requires a construction of the last

sentence of section 18 of the Divorce Act (Ill. Rev. Stats., 1937, chap. 40, par. 19, p. 1221) which reads:

"And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance and the care, custody and support of the children, as shall appear reasonable and proper."

Plaintiff says that a decree of this kind is a final decree and, as in other cases, cannot be changed except in so far as the statute authorizes the court to alter it to meet new conditions, citing Keene v. Keene, 241 Ill. App. 414, and that the practice and procedure of a court of equity in separate maintenance actions are practically the same as in suits for divorce, citing Cox v. Cox, 192 Ill. App. 286. These cases so hold.

Plaintiff cites Webster's New International Dictionary to the effect that the word "alter" means "to change in one or more respects, but without destruction of the identity of the thing changed"; 2 C. J. 1165, to the effect that the word "alter" also means "to change in form without destroying identity"; 2 C. J. 1165, Note 67 (A), with Haynes v. State, 15 Ohio St. 458, to the effect that a thing which ceases to exist cannot in any sense be said to be altered; that if it is altered it has merely changed its former nature but still has existence; and 2 C. J. 1166, Note 88 (A) to the effect that the word "alter" is the equivalent of "to increase or diminish." The order does not, in our opinion, destroy the separate maintenance decree. The obligation to pay is to cease only "until required by order of this court." The necessary inference is that the court retains jurisdiction at a future time to order further payments. While we hold this is a necessary inference we think the words "and vacated" might well have been omitted because it may give color to these contentions. We hold a proper construction of the order is that it merely suspends until the further direction of the court these payments; that the judgment

of the original decree that plaintiff is entitled to support and maintenance remains in force and effect; and that the court may at any future time, upon proper showing, order further payments. That such an order does not oust the court of jurisdiction to further enforce a decree of this kind has been held in O'Toole v. O'Toole, 215 Cal. 441, 10 Pac. (2nd) 461; and Ross v. Ross, 1 Cal. (2nd) 36, 35 Pac. (2nd) 316.

A more difficult question is raised by plaintiff's second contention. The amount of alimony to be allowed a wife for separate maintenance does not depend alone upon the question of defendant's culpability, but also upon the amount of property and income of the parties, their ages, health, past and present habits, social conditions and circumstances, and dependency of the children. Decker v. Decker, 279 Ill. 300. The amount of contribution, if any, made by the wife to the husband's estate may also be taken into consideration. Cole v. Cole, 142 Ill. 19. In order to justify the entry of an order changing the amount of alimony to be paid it was necessary for the defendant to show change in the circumstances of the parties after the entry of the original decree of February 4,1929. It appears from the record that at the time of the entry of the decree the only source of income of plaintiff was derived from her employment as a substitute teacher in the day high school and in the evening schools of the City of Chicago. At that time she had the care and custody of her nine year old daughter. Her financial condition has improved very much since the decree was entered; she is now regularly employed as a teacher by the Board of Education at a salary of $200 a month, or $1900 for the school year. This is an increase of $1067 a year over what she was earning at the time the original decree was entered. At the time the decree was entered she was obligated to support the daughter; the daughter has now attained her majority and plaintiff is relieved of that financial liability.

The evidence also shows plaintiff has three bank accounts; that she has about $200 in one bank, $1000 in another, and about $100 in a third, besides $200 with the United States Postal Savings Bank. She owns two bonds of $500 each, which are apparently good. She has three insurance policies for not less than $1000 each, and two of these are 20-year endowment policies. Her future is provided for somewhat in that she will later be entitled to receive a pension from the School Pension Fund.

The circumstances of defendant have also changed somewhat. He is a practicing lawyer, engaged by the same firm he was with when the decree was entered. He shows he has no investments; that his checking account is about $200; that he owns a second-hand 1937 automobile, a cottage at the Dunes built on leased ground; carries an annual premium of $950 a year on $20,000 life insurance taken out for the benefit of the daughter. At the time the decree was entered his earnings from the practice of the law were $8300 per annum. At the time of the filing of the petition he was earning $9088 per annum, an increase of $788 a year. During the year 1937 Joan attended the University of Michigan and defendant contributed $1127.83 for her expenses there from August, 1937, to April, 1938. Plaintiff also contributed for the same purpose $300 from August, 1937, to June, 1938. Plaintiff maintains a home for herself and daughter, and the daughter stays with plaintiff during summer vacations. Plaintiff has no household furniture; she lives in a furnished apartment, paying $75 a month rent, but moved into an apartment costing $57.50 a month after defendant stopped payments. Plaintiff testified that it is necessary for her to have a college degree to continue to teach; that she does not have the degree; that it will be necessary for her to attend evening and summer school for that purpose; the tuition and expenses will amount to about $150 a year.

These are the material facts presented to the Chancellor,

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These are [illegible] material facts presented to the chancellor,

who had the advantage of seeing the parties and hearing them testify.

The order from which defendant appeals finds defendant has been providing for the support, maintenance and education of Joan Kraus and has agreed to continue this support and maintenance while it may be necessary in the future. The age of the parties, a material circumstance, does not appear - it may fairly be presumed because they preferred it should not. The cases are all to the effect that a petition of this kind is addressed to the sound judicial discretion of the Chancellor and that an Appellate court will not reverse unless, as was said in Craig v. Craig, 163 Ill. 176, "it is manifest that injustice and injury have been done." To the same effect are Stillman v. Stillman, 99 Ill. 196; Herrick v. Herrick, 319 Ill. 146; Zimmerman v. Zimmerman, 242 Ill. 552; Heyman v. Heyman, 210 Ill. 524. In the Herrick case the Supreme court said:

> "The order was entered after a full hearing before the Chancellor, and we are not prepared to say that the modification with respect to the amount of payments required was not warranted by the evidence. That being true, the order of the Chancellor must stand."

We may not overlook the fact that the defendant has been making ample provision for the education of the daughter, in whom both parties are much interested, and that he has promised to continue to do so. Coercion is not always the best method by which to secure financial support from a husband, as women well know. While we would have been inclined to direct the continued payment of some alimony, the course pursued by the Chancellor may in the end bring better results. The precise question for decision is, Was the order under all the circumstances an abuse of discretion? We can not say it was.

The order will be modified by striking therefrom the words "and vacated" and so modified will be affirmed.

AFFIRMED AS MODIFIED.

O'Connor and McSurely, JJ., concur.

40596

THERESA FREEDMAN,
Plaintiff and Appellee,

v.

MARY CORBETT HUNT and GEORGE F. HUNT,
Defendants and Appellees.

HARTFORD ACCIDENT AND INDEMNITY CO.
a Corporation, and CHICAGO TITLE AND TRUST
COMPANY, an Illinois Corporation, as Administrator of the Estate of May Corbett
Hunt, Deceased,
Intervenors (Appellants.)

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

December 23, 1932, plaintiff caused judgment to be confessed against Mary Corbett Hunt and George F. Hunt in the Municipal court of Chicago for $6213.11. The statement of claim declared for money due on a promissory note executed by the defendants December 2, 1932, which was attached to the statement of claim.

This note is in form a chattel mortgage note to the order of plaintiff for $5962.50, due one year after date, with interest at 6% semi-annually and at the rate of 7% per annum after maturity. The note contains power to confess judgment in term time or vacation, without process, and the makers waive and release all errors that may intervene at any such proceeding. The signatures to the note are "May Corbett Hunt" and "George F. Hunt." On the reverse side of the note is this statement: "This note is subject to the terms of a letter dated December 2, 1931, from Theresa Freedman to May Corbett Hunt." There also appears on the back of the note a number of credits for payments made thereon at various times.

The statement of claim was verified by Helen Royer, who also made oath to the execution and delivery thereof, and the amount due on plaintiff's claim. This is followed by a cognovit signed by Lester B. Mason, as attorney for defendants. It admits the averments of the statement of claim against Mary Corbett Hunt and

George F. Hunt, and the judgment entered was against "Mary Corbett Hunt and George F. Hunt." Execution against Mary Corbett Hunt and George F. Hunt issued to the bailiff December 24, 1932, but was returned by him unexecuted and without demand being made.

January 4, 1933, on motion of attorney for plaintiff, leave was given to amend the statement of claim on its face, to read "May Corbett Hunt, defendant, instead of Mary Corbett Hunt," and the judgment also was amended to conform with the statement of claim. As amended it read, "May Corbett Hunt, defendant, instead of Mary CorbettHunt."

An alias execution issued on the judgment as amended on April 21, 1934. This execution also was returned by the bailiff unserved. July 25, 1938, the bailiff, acting under a pluries execution, levied upon certain real estate. May Corbett Hunt having died, the Chicago Title & Trust Company was appointed administrator of her estate, and on April 12, 1938, plaintiff caused notice to be served on the administrator pursuant to section 39, paragraph 42, chapter 77, of the Revised Statutes (Ill. Rev. Stats. 1937, p. 1904) that plaintiff had recovered judgment on December 24, 1932, against May Corbett Hunt, now deceased, and that the judgment remained in full force, unsatisfied.

October 7, 1938, the Hartford Accident and Indemnity Company, a corporation, presented its motion in the cause to vacate the judgment theretofore entered on December 23rd, and to vacate the order entered January 4, 1933, amending that judgment, and to vacate and set aside and quash the levy and sale made upon the execution issued on the judgment August 31, 1938, and to stay further proceedings, in support of the motion presenting a petition which it asked leave to file.

On the same day the Chicago Title & Trust Company made its motion to vacate this judgment upon grounds stated in the motion, that the judgment was entered by confession against Mary Corbett

Hunt, whereas the warrant of attorney authorized confession against May Corbett Hunt and George F. Hunt; that the order of January 4, 1933, purported to amend the judgment and statement of claim, was entered ex parte, on motion of plaintiff's attorney, without notice to or consent by the attorney who had signed the cognovit on behalf of defendants, and without any petition or affidavit or notice to anyone else; that the cognovit filed with the statement of claim never was purported to have been amended; that the endorsement on the reverse side of the note to the effect that it was subject to the terms of the letter, etc.; that the letter was not filed nor any copy made; that the note was so uncertain and incomplete that it could not support any legal or valid judgment; that the judgment purported to be against one defendant only upon a joint warrant and cognovit; that the rules of the court then in effect required notice of motion to be served on the attorney for the opposite party, and that these rules were violated by the entry of the order purporting to amend without service of notice, etc. The motion is signed by the administrator by its attorney but is not supported by any affidavit as required by the Rules of the Supreme Court. (Ill. Rev. Stats., 1937, chap. 110, par. 259.26) which states: "A motion to open a judgment by confession shall be supported by affidavit."

The petition of the Indemnity company is verified. It sets up that the intervenor is the owner by assignment of a judgment in the sum of $25,000, entered by the Circuit court of Cook county February 27, 1934, against May Corbett Hunt and Catherine Golz; that execution issued has been returned no part satisfied. It also sets up the liability upon which the judgment was based, and consideration for which it was assigned to petitioner June 29, 1934, upon order of the Probate court, and avers the judgment has not been paid; that May Corbett Hunt in her lifetime owned real estate on which this judgment became a lien. The petition then

sets up the proceedings as heretofore related in this cause on December 23, 1932, the entry of the judgment and its amendment. It sets up the death of May Corbett Hunt on August 30, 1936, the issue of letters on her estate by the Probate court of Cook county on January 7, 1937, and avers that plaintiff had caused an execution to be levied on the real estate of May Corbett Hunt, and that Theresa Freedman is seeking to have applied upon an alleged deficiency under the sale under said execution funds now in the custody of the Circuit court, derived from income of this realestate. The petition avers petitioner has a judgment lien on the real estate superior to the claim of Theresa Freedman, and prays that the judgment of December 23, 1932, be vacated, set aside and held for nought.

The motion of the administrator, Chicago Title & Trust Company, was denied October 26, 1938, and the motion of the Hartford Accident and Indemnity Company for leave to file its petition was also denied. From these orders the administrator and the Indemnity company have perfected this appeal.

Because as it is claimed, the pleadings and judgment incorrectly included the letter "r" in the given name of Mrs. Hunt, and because the pleadings as filed described the note issued as of a date in 1932, when it should have been 1931, the intervenors argue the court was without jurisdiction and ask that the judgment entered December 23, 1932, shall be opened. This motion was first made October 7, 1938, nearly eight years after the judgment was entered. There is no showing of diligence by those who made the motion; there is no showing of meritorious defense in behalf of any person; there is no showing that May Corbett and Mary Corbett is not the same person; there is no denial that the signatures to the note filed are true and genuine signatures; there is no showing of fraud; there is no showing of any equitable reason whatever why this judgment should be set aside, nor any showing of any right of the

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so-called intervenors to appear in this suit. Judgments at law do not rest upon any such precarious foundations. The intervenor is not a party to the suit. In re. Burdick, 162 Ill. 45. The alleged errors do not render the judgment void. Pond v. Ennis, 69 Ill. 341; Feld v. Loftis, 240 Ill. 105. The supposed errors complained of, if any, were released by express provision of the power of attorney to confess judgment. Chase v. Dana, 44 Ill. 262; Harris Trust & Savings Bank v. Neighbors, 222 Ill. App. 2.1. Every reasonable intendment will be indulged in favor of a judgment entered by confession the same as in every other judgment. Alton Banking & Trust Company v. Gray, 347 Ill. 9 . It would serve no useful purpose to discuss the many cases cited in the briefs. The question of the merits of these appeals is not difficult to decide.

The orders will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

40605

JULES J. REINGOLD,
Appellant,

v.

LLOYD F. PETERSON et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

301 I.A. 605

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Reingold from a decree entered on September 8, 1938, in consolidated causes, one of which was brought by Reingold and the other by the Chicago Title & Trust Company, trustee, to foreclose a trust deed made and executed by defendants, Lloyd F. Peterson, Eric Ragnar Benson and Elsa Kersten Benson, on October 15, 1925, conveying to Chicago Title & Trust Company, trustee, to secure the payment of 98 bonds in the aggregate principal amount of $29,000, certain premises. The suit by Reingold was filed April 22, 1938. It made parties thereto Lloyd F. Peterson, Eric Rangar Benson and Elsa Kersten Benson, and Henry Appelhans, holder of the title as trustee for Lena Hecht and Sam Hecht, her husband. Without specifically averring ownership thereof, Reingold based his complaint upon the theory that he was the owner of bond No. 19, for the principal sum of $500. The complaint averred that March 18, 1938, he caused a notice to be served on the Chicago Title & Trust Company, trustee, that he had elected to declare the whole bond issue due for default in payment and demanded the trustee institute proceedings to foreclose, tendering bond and indemnity; that more than 30 days elapsed and the trustee having failed to take action, plaintiff brought his suit on behalf of the owners of all the unpaid bonds.

The Reingold complaint did not make Chicago Title & Trust Company, trustee, a defendant. He did not attach a copy of the

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company, trustee, a defendant. He did not allege a copy of the

trust deed in conformity with sec. 36 of the Civil Practice Act. (Smith-Hurd Anno. Stats., chap. 110, par. 160.) Summons issued but was not served. Peterson and Benson answered denying Reingold's right to foreclose. The Hechts answered that the plaintiff was a mere volunteer, and that, as a matter of fact, the bond in his possession had been paid for by him acting in behalf of the owner of the premises. May 20, 1938, upon notice, an order was entered by Judge Niemeyer consolidating the Reingold suit with the suit brought by the Chicago Title & Trust Company to foreclose the same mortgage. The Reingold suit is No. 38S 3065 and the trust company's suit is 33S 4187. The consolidated cause came on for hearing before the chancellor. The original trust deed was apparently introduced in evidence, although there is no report of proceedings showing this to be true. At any rate a purported copy of the trust deed is in the record. The court after hearing the evidence, September 8, 1938, entered a decree finding that Reingold was without right to foreclose, that there was no provision in the trust deed giving him authority to do so in behalf of all the bondholders, and that the complaint should be dismissed for want of equity. The suit of Reingold was dismissed. The suit brought by the Chicago Title & Trust Company was referred to a master and is still pending.

Plaintiff argues at length (citing authorities) that under the terms of the trust deed he had a right to maintain a suit in behalf of all the holders of the bonds. There is no report of proceedings. The trust deed was not attached to the complaint. Under the civil Practice Act it now rests with the party complaining of the decree to preserve the evidence. (First National Bank v. 10 West Elm Street Building Corp., 277 Ill. App. 337.)

However, assuming the copy of the trust deed in the record to be correct and before us for construction, the decree must be affirmed for two reasons. In the first place, granting plaintiff

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is right in construing the trust deed to give him a right to foreclose in behalf of all the bondholders upon the conditions stated therein, it clearly appears these conditions have not been performed. The trust deed expressly places the right to foreclose in the trustee to the exclusion of all others until the trustee has failed or refused on demand to foreclose. This record shows he has neither failed nor refused. On the contrary, within a reasonable time after demand, he brought a foreclosure proceeding. In the second place, we agree with the defendant that the trust deed does not grant to the holder of only one bond the right to foreclose in behalf of all other holders of bonds. Section 1 of Article 3 of the trust deed provides that in case of continued default in the payment of principal and on the written request "of the holder of any one or more of the then outstanding bonds" the trustee shall foreclose, etc. This undoubtedly grants to the holder of any defaulted bond the right to make the demand and places on the trustee the duty in a proper case to comply with the demand. Section 1 of Article 4 of the trust deed provides: "No holder of any bond or coupon shall have any right to institute any suit for foreclose (except as provided in section 3 of this Article) until notice has been given of their demand made upon the trustee, as herein provided," etc. Section 3 of Article 4 specifically provides for the filing of a partial foreclosure for the amount due upon the bond owned by any bondholder without foreclosing for the entire amount of indebtedness due. This partial foreclosure, it is evident, can be undertaken without filing any demand of any kind or tendering any indemnity. The provisions for demand by a bondholder on the trustee are for the foreclosure of the entire indenture. Plaintiff says if this were not so then section 1 would be a nullity and could never have any application because section 3 of Article 4, providing for a partial foreclosure, does not require demand on the trustee prior to instituting suit. All this may be

true. Nevertheless, we find no provision in this trust deed which, in such case, gives to plaintiff the right to bring his foreclosure suit in behalf of all the bondholders. He may start his suit to foreclose but he is not granted authority to bring the suit for anybody except himself. For these reasons plaintiff was without authority to maintain the suit in behalf of all the bondholders, and the court did not err in dismissing it. At any rate, in the absence of a report of proceedings, we must assume the decree was justified. (First National Bank v. 10 West Elm Street Building Corp., 277 Ill. App. 337. If plaintiff is the owner of the bond his rights will be protected in the suit brought by the trustee at his own request. The decree is amended by striking the words, "for want of equity" and inserting in lieu thereof the words, "without prejudice", and so amended is affirmed.

DECREE AFFIRMED AS MODIFIED.

O'Connor and McSurely, JJ., concur.

40571

E. W. WENSTRAND as Trustee,
Appellee,

vs.

FRED A. RATHJE as Trustee,
Appellant,
and CORDELIA L. INGERSOLL,
Individually and as Executrix
of the Last Will and Testament
of Stephen A. Ingersoll, Deceased,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

E. W. Wenstrand filed a complaint seeking an accounting; the defendants were Cordelia L. Ingersoll individually and as executrix of the last will and testament of Stephen A. Ingersoll, deceased, and Fred A. Rathje individually and as trustee; defendant Rathje, as trustee, filed a counterclaim seeking attorney's fees. The court held against the claim of plaintiff and he has not appealed. The decree denied Rathje's claim for a lien for attorney's fees, amounting to $11,050, against the securities and cash, and required him to surrender to Cordelia L. Ingersoll, executrix, these securities and cash amounting to $4090.01. Rathje has appealed.

The master to whom the cause had been referred found in substance that on January 9, 1936, Stephen A. Ingersoll resided in Galesburg, Illinois, was 78 years of age and ill with cancer from which he died the following May. He was owner of stock in the Ingersoll company, which owned a tract of 20,000 acres in Colorado known as Broad Acres; he was very anxious to sell this.

George A. Lee and the plaintiff, E. W. Wenstrand, were dealers in real estate in Chicago; both were without funds, and suggested to Mr. Ingersoll that if he would finance Westrand in the purchase of two-thirds of the outstanding securities on three

Chicago hotel properties, Wenstrand would conduct a foreclosure sale of them and either place a loan against the properties or sell them for sufficient profit, and from the proceeds reimburse Ingersoll for all moneys advanced by him with interest and in addition pay him a bonus of $20,000; that Wenstrand would have enough left from the proceeds of the sale of the properties to buy Broad Acres.

Mr. Ingersoll wanted a Chicago attorney to receive the advances made by him and pay out the cash for the securities as Lee might obtain them. Lee introduced Ingersoll to defendant Rathje and a writing was entered into designating Rathje as a trustee to handle and pay out such sums as might be deposited with him by Ingersoll to be used by Lee in the purchase of the bonds or certificates of the hotel properties.

Lee was to purchase these securities at not to exceed 13¢ on the dollar, receiving 1% as his commission. Rathje accepted this trust and Ingersoll deposited with him all together $17,000 for the purpose indicated. Lee was not successful in securing any great number of securities, and Ingersoll wrote him protesting against the delay. Before his death Ingersoll offered to put up more money with Rathje, who refused it on the ground that the bonds were coming in so slowly that he could not use the money he already had in the fund.

Mr. Ingersoll died May 15, 1936; up to that time there had been purchased with the money in Rathje's hands about $13,000 worth of securities. Wenstrand, Lee and Ingersoll had originally estimated that Mr. Ingersoll would buy not less than $100,000 worth of these securities. After Mr. Ingersoll's death repeated requests were made to Rathje to render an accounting and turn over to the family the securities and cash he had on hand. Rathje asked for additional time, saying he thought they could finance the matter

if given further time; but nothing further was done and the deal was abandoned.

In the instant suit plaintiff asked for an injunction to prevent the executrix of the Ingersoll estate from obtaining possession of the cash and securities in Rathje's hands. Rathje paid $13,184.99 for the securities he now holds and is asking that he be awarded $10,000 as attorney's fees and an attorney's lien on the securities for the amount. The master held against this claim.

In his verified amendment to his answer in this case Rathje states that under the agreement between Wenstrand and Ingersoll, Rathje's fees were to be paid by Wenstrand.

Shortly before the death of Ingersoll his two sons had a talk with Rathje about the matter of fees in which he said that "there would be no fees or expenses to father." Rathje stated that he expected to get his fees and expenses "out of the deal with these three properties." Rathje confirmed this by testifying that "I was to receive a fee at the end when the thing was all cleaned up." There was other evidence to the same effect and no evidence that Ingersoll promised to pay Rathje for services. Ingersoll seems to have been careful in all he said or wrote to have it clearly understood that he was under no personal liability for any expenses. The record supports the finding of the master that it was agreed between Ingersoll and Rathje at the time the moneys were deposited with Rathje that any fees accruing to him would be paid out of the proceeds ultimately derived from the sale of the properties involved and no recourse was to be had to Stephen A. Ingersoll for payment of any fees.

In February and March Rathje drew three contracts for the sale by Mr. Ingersoll to Wenstrand of stock of the company owning Broad Acres. Only one of these contracts was executed. In all of them it was specifically provided that all attorney's fees and other expenses incurred in and connected with the drawing of the contracts

should be paid by the party of the second part, Wenstrand. Rathje claims $2500 for his services in drawing these contracts.

The master correctly found that the assets upon which Rathje claims an attorney's lien are held by him in a trust capacity and consequently he can have no lien upon them, either as attorney or as trustee.

The Attorney's Lien statute, par. 14, chap. 13, Ill. Rev. Stats. 1937, gives attorneys a lien "upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection *** for the amount of any fee" either as agreed upon, or a reasonable fee, with a further provision that "such attorneys shall serve notice in writing" upon the party against whom their clients may have suits.

Counsel for the executrix correctly says that "Mr. Ingersoll did not place a claim, demand or cause of action with Mr. Rathje for suit or collection; and *** there is no evidence in the record that any notice was served in writing as required by the statute."

We hold that the record supports the decree of the Circuit court and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40579

BRENDA HOLTER,
Appellee,

vs.

FORREST W. HOLTER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

March 31, 1937, plaintiff filed her complaint for divorce in the Circuit court of Cook county, alleging habitual drunkenness of defendant; defendant was personally served with summons and entered his appearance; April 25, 1938, defendant filed an answer and on April 26th a cross-complaint; these were filed without leave of court; October 18th on motion of plaintiff the cause was dismissed and defendant appeals, arguing, among other things, that the court was in error in dismissing plaintiff's complaint when a cross-complaint was on file.

This is now a moot question. On appeals from the Superior court, docket numbers 40379 and 40563, in an opinion filed in this court April 10, 1939, we stated the various orders entered in the controversy between these parties. We noted that on April 13, 1938, plaintiff had filed in the Superior court her complaint asking for a divorce, charging her husband with adultery; that after hearing of evidence plaintiff was granted a divorce June 23, 1938; subsequently defendant moved to vacate this decree, which was denied, and defendant appealed from that order; in the opinion in case No. 40563 we affirmed that order, thus leaving the decree of divorce in full force and effect.

Under these circumstances it was proper to dismiss the Circuit court proceedings, and the points made in the instant brief are without merit.

The order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40613

B. MOSKOVITZ,
Appellant,

vs.

CHESTER ARTHUR WOOD et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

301 I.A. 606[2]

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case involves a claim by B. Moskovitz, hereafter called plaintiff, for the allowance of an attorney's fee and costs in a partition proceeding; the trial court denied plaintiff's request and dismissed the partition suit, and she appeals.

March 26, 1930, plaintiff filed her petition seeking the partition of certain real estate; the defendants' demurrer to this petition was sustained. April 22, 1930, plaintiff filed her second suit for partition of the same premises; demurrer to this petition was sustained. July 9, 1930, a third petition by plaintiff was filed and a decree of partition entered January 10, 1931, and commissioners were appointed who reported values. September 29, 1931, defendants filed their objections to this report and after hearing the court on January 23, 1932, removed these commissioners and appointed three other commissioners to value the property and report.

Thereafter, on June 24, 1932, plaintiff executed her deed conveying all her right, title and interest in the premises to Patricia Elliott, one of the original defendants. Apparently Patricia Elliott took possession of the premises and occupied them for approximately six years, and in the meantime nothing further was done in the partition proceeding.

July 8, 1938, defendants filed their petition asking for leave to file a cross-bill for an accounting and for a receiver of the premises.

October 6, 1938, Patricia Elliott conveyed all her interest in the premises to Arthur F. Siebel, one of the original defendants, thus leaving as the only parties interested in the premises Arthur F. Siebel, Patricia Scheck and Chester A. Wood.

October 19, 1938, these defendants and Patricia Elliott filed their stipulation that the partition proceeding be dismissed. On the same date these defendants filed a supplemental petition alleging that B. Moskovitz, the plaintiff, had conveyed all her interest in the premises to Patricia Elliott; that subsequently Patricia Elliott had conveyed all her interest in the premises to Arthur F. Siebel, co-defendant, and that Siebel, Patricia Scheck and Chester A. Wood are the sole owners of the premises sought to be partitioned; that they were not desirous of a sale and had stipulated to discontinue and dismiss the proceedings. Plaintiff filed an answer to this petition alleging that the original decree, entered January 10, 1931, made no allowance for plaintiff's reasonable attorney's fees and costs; that $1400 would be a fair and reasonable allowance for such fees. Plaintiff further asked that she be allowed $278 for minutes of title for use in the partition proceedings. On motion of defendants this answer of plaintiff was stricken and an order was entered dismissing the cause. This appeal followed.

Section 40, chapter 106, Partition act, provides that the court shall apportion the costs among the parties in interest, including the necessary expenses, when the rights and interests of all the parties "are properly set forth in the complaint." Also, solicitors' fees and necessary costs shall be apportioned unless the defendants shall interpose a good and substantial defense to the complaint. In McMullen v. Reynolds, 209 Ill. 504, it was held in effect that it would be inequitable for the defendants to pay any portion of the complainant's solicitor's fee in a partition suit

where the suit was prosecuted in a manner hostile to the defendants, necessitating the employment by them of counsel to protect their interests. And in McLaughlin v. Hann, 333 Ill. 33, where it was necessary for the defendants to be represented by counsel, it was held that an order that the fee of complainant's solicitors should not be apportioned was correct. See also Mulloy v. Mulloy, 231 Ill. 285, and Cowdrey v. Hitchcock, 103 Ill. 26[illegible], where the statute relating to solicitors' fees was held to apply only to amicable suits for partition.

The record shows that in the present case three complaints were filed by plaintiff and demurrers to two sustained; it was charged by defendants that two of the three commissioners appointed under the third complaint to value the property were young lawyers without experience in valuing real estate, and that they were influenced and dominated by Maurice L. Davis, attorney for plaintiff; that the valuations by the commissioners of the real estate involved were "rediculously low". The court thereupon discharged the commissioners. Under these circumstances plaintiff is in no position to require that her expenses be apportioned among the defendants.

June 24, 1932, plaintiff conveyed all her interest in the real estate to Patricia Elliott, one of the defendants. Applicable to this situation is the general rule that after a plaintiff has parted with his interest in the subject matter of the litigation he cannot prosecute further for any purpose. Smith v. Brittenham, 109 Ill. 540, 549; Sartain v. Davis, 323 Ill. 269. In the latter case it was held that where the plaintiff had divested himself of his interest in the land sought to be partitioned, the suit was not necessarily abated but the condition results in a suspension of the suit; that the person to whom the interest is transferred should supply the defect of parties by filing an original bill in the nature of a supplemental bill, and that the new plaintiff could proceed in

the suit and be entitled to the benefit of the proceedings taken prior to his entry into the suit.

When on June 24, 1952, Patricia Elliott acquired all of the interest of plaintiff, B. Moskovitz, in the partition proceedings she was entitled to all benefits of the prior proceedings, but plaintiff's rights and interest therein were terminated; she cannot, six years thereafter, for the first time assert any right to expenses and costs incurred in that proceeding.

Other points are made upon which it is unnecessary to comment.

For the reasons stated, and as defendants, being the sole owners of the premises, have the right to terminate the partition proceedings, the orders of the Superior court touching these matters are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40296

MAYWOOD FARMS COMPANY,
a Corporation,
Appellant,

vs.

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, a voluntary unincorporated association, ROBERT G. FITCHIE, JAMES KENNEDY, STEVE C. SUMNER, FRED C. DAHMS, F. RAY BRYANT, ALBERT C. RICHARDS, JOSEPH L. PATTERSON and DAVID A. RISKIND,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

301 I.A. 607

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its complaint seeking to have defendants enjoined from picketing the stores of its customers; the master in chancery, after hearing evidence, recommended dismissal of the complaint; exceptions were overruled, the court entered a decree dismissing the complaint, and plaintiff appeals.

The complaint alleged and the master found that plaintiff is a corporation with its principal office in Maywood, Cook county, and engaged in Chicago and surrounding suburbs in distributing, pasteurizing and bottling milk and dairy products and selling them in Chicago and suburbs; that it purchases large quantities of milk from farmers and out-of-town plants and carries it in its own trucks to its plant in Maywood where it is pasteurized and bottled and made ready for distribution. Its products are delivered by plaintiff's trucks to certain stores, to be resold to the customers of such stores. Plaintiff also sells to independent contractors or vendors, who buy plaintiff's products and pay for them at the plant of plaintiff. The master found that by this means plaintiff sells its product at a price less than that established by other dairies in the Chicago area doing business on a house to house basis. The complaint alleged that all of plaintiff's employees were active, paying members of a union called the Chicago Milk Vendors, Drivers and

Dairy Workers Union. Its members are not members of defendant union.

There is no dispute or difference of any character or kind between plaintiff and any of its employees regarding sales arrangements, wages or working conditions. Defendant Union hired pickets for the specific purpose of picketing the stores of customers of plaintiff. The pickets patrolled back and forth in front of these stores, carrying a placard or banner having inscribed thereon the words, "This store is unfair to Milk Wagon Drivers' Union, Local 753, affiliated with American Federation of Labor." The picketed stores have no connection with defendant union. The master found that the pickets spoke to drivers making deliveries of other commodities to these stores, and as a consequence deliveries of other commodities were refused to these storekeepers. By reason of this picketing plaintiff is in danger of losing the business of these stores.

The recommendation of the master, followed by the chancellor, was that our Anti-Injunction act of 1925 (Ill. Rev. Stats. 1937, chap. 48, par. 2a) prohibits enjoining picketing in a case of this kind, relying on Fenske Bros. v. Upholsterers Union, 358 Ill. 239, and Schuster v. International Assoc. of Machinists, 293 Ill. App. 177. Without discussing these cases, it is sufficient to say that subsequent to those opinions, it has been held by two later opinions by our Supreme court that an injunction will issue to prevent picketing where there is no dispute between the employer and the employee. Meadowmoor Dairies v. Drivers' Union, 371 Ill. 377; Swing v. American Federation of Labor, Docket No. 25083, opinion filed in April, 1939. It follows, from a consideration of the opinions in these cases, that plaintiff was entitled to an injunction as there was no dispute between it and its employees.

A further reason for the issuance of an injunction in this case is found in the opinion in the Meadowmoor case, which holds

Dairy Workers [illegible] motion.

[illegible] between [illegible] merits, [illegible] for [illegible] plaintiff. [illegible] stores, [illegible] works, [illegible] 75%, [illegible] stores [illegible] later [illegible] [illegible] to prevent [illegible] [illegible] and the [illegible] 377; [illegible] opinion filed [illegible] [illegible] the opinion [illegible] [illegible] [illegible] function as [illegible] no dispute for [illegible] employees.

A first [illegible] reason for the issuance of a injunction in this case is found in the opinion in the Redhouncer case, which holds

that it is illegal to persuade or coerce persons dealing with one in business into discontinuing such dealings by means commonly called a secondary boycott. The opinion in that case held that picketing the customers and thus destroying the seller's business would tend to prevent competition and foster monopoly, and that "There is nothing in the Anti-Injunction statute that prohibits the issuing of an injunction to restrain boycotting or interfering with contract relations, other than employment contracts, or the right to do business generally....."

The master's fees are questioned. When the report was filed the master asked for the allowance of $1986.55 as his fees; plaintiff filed a written motion objecting and asking that the statutory fees be allowed; without any recital of facts the chancellor reduced the fees to $1500 and denied plaintiff's motion to reduce the fees to the amount allowed by the statute. Chap. 90, par. 9, Ill.Rev.Stats. 1937, provides that masters in chancery shall receive for their services such compensation as shall be allowed by law; and chapter 53, par. 38, provides for fees of a master in chancery. Upon the remandment of this case the chancellor should revise the allowance for the master's fees, following the statutory provisions.

The decree dismissing the complaint is reversed and the cause is remanded with directions to enter a restraining order in accordance with the prayer of the complaint, and that the fees of the master be recast.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

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40296

MAYWOOD FARMS COMPANY,
a Corporation,
Appellant,

vs.

MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, a Voluntary Unincorporated Association, ROBERT G. PITCHIE, JAMES KENNEDY, STEVE C. SUMNER, FRED C. DAHMS, F. RAY BRYANT, ALBERT C. RICHARDS, JOSEPH L. PATTERSON and DAVID A. RISKIND,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

301 I.A. 607

SUPPLEMENTAL OPINION AND JUDGMENT ORDER.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

David A. Riskind having moved this court to amend its opinion and judgment in the above entitled cause so that he may be dismissed from the cause, and it appearing to the court that there was no evidence in the record concerning David A. Riskind connecting him in any way with the allegations made in the plaintiff's complaint, and there being no objection on the part of the counsel for the plaintiff, the opinion is so modified as to affirm that part of the decree appealed from which dismissed the cause as to David A. Riskind. In all other respects the decree is reversed and the cause remanded with directions as given in the opinion filed in this court October 16, 1939.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

40642

HENDRICKSON MOTOR TRUCK CO., a Corporation, et al., Appellees,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, AUTOMOBILE MECHANICS LOCAL 701, a Voluntary Association, et al., Appellants.

APPEAL FROM INTERLOCUTORY INJUNCTION of December 27, 1938.

301 I.A. 608

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Hendrickson Motor Truck Company, a corporation, was engaged "in the business of manufacturing, selling, repairing, reconditioning and servicing motor trucks and motor truck parts and appliances" at its place of business, 3538 South Wabash avenue, Chicago. It filed its verified bill against two unions and some of their officials to restrain them from picketing plaintiff's business and from exhibiting any sign or placard characterizing plaintiff or its place of business as being non-union or unfair to organized labor for refusing to permit collective bargaining; from carrying on a secondary boycott; from physically obstructing or interfering with plaintiff's business or its employees, etc. Defendants filed their verified answer in which they averred that they attempted to unionize various employees in Cook county who were engaged in the craft or trade of repairing automobile trucks and had succeeded in unionizing approximately 80% of such employees, as a result of which working conditions were improved, wages increased and hours decreased; that plaintiff conducted a non-union shop and defendants were attempting to unionize plaintiff's employees; that for this purpose they conferred with plaintiff's representatives for the purpose of meeting its employees and to confer with them; that plaintiff would not give its consent in this respect; that thereupon defendants caused two pickets to be placed in front of

HEMPRICHSON
a Corporation,

INTERNATIONAL
MACHINISTS,
LOCAL 701,
et al.,

plaintiff's premises, one of whom bore a banner bearing on it the words, "Unfair to Auto Mechanics, Local 701, A. F. of L." and the other carried a similar banner bearing on it the words, "Unfair to Teamsters and Chauffeurs Union, Local 713, I. B. of T., A. F. of L." The answer denied any intimidation or violence but averred that the picketing was conducted in a peaceful manner.

While plaintiff's motion for a preliminary injunction was pending this court handed down an opinion in Swing v. American Federation of Labor et al., 298 Ill. App. 63. A few days thereafter plaintiff, by leave of court, amended its complaint by adding six of its employees as additional parties plaintiff, and shortly thereafter an order was entered granting a temporary injunction as prayed for. Defendants appeal only from that part of the injunctional order by which they were enjoined from peaceful picketing. In this connection counsel for defendants say that "defendants are interested in reversing the temporary injunction only in so far as it restrains defendants from 'peacefully picketing' by displaying a banner on the public highway in front of Hendrickson Motor Truck Co., a corporation's premises," although they say there were other provisions of the order that are "unsound in law and fatally defective."

There seems to have been no dispute between plaintiff and any of its employees, and counsel for plaintiff say that its employees had a union of their own known as "Self-Organization of Hendrickson Motor Truck Co. Employees" of which nearly all of plaintiff's employees were members and that plaintiff had recognized this organization for the purpose of collective bargaining as to the terms and conditions of their employment.

In the Swing case (298 Ill. App. 63) in construing the act on injunctions in labor disputes, enacted in 1925, which prohibits the issuance of injunctions in labor disputes in certain cases, we

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In the Orlino case (29 Ill. App. 2d) [illegible] the act on injunctions in labor disputes, enacted in [illegible], which prohibits the issuance of injunctions in labor disputes [illegible] certain cases, we

held the act was inapplicable where the relation of employer and employee did not exist. Prior to the enactment of this statute peaceful picketing was unlawful. Barnes v. Typ. Union, 232 Ill. 424; Swing v. Amer. Fed. of Labor, 298 Ill. App. 63; Schuster v. Int. Assn. of Machinists, 293 Ill. App. 177. We issued a certificate of importance in the Swing case. After the briefs were filed in the instant case and while the Swing case was pending on appeal from this court the Supreme court rendered an opinion in Meadowmoor Dairies v. Drivers Union, 371 Ill. 377, and held that the Labor-Anti-Injunction act of 1925 applied only to cases where employees have a dispute with their own employer or in a labor dispute between groups of employees and employers. And at the next term the Supreme court handed down an opinion in the Swing case in which the court said: "The first point which they urge, that the Illinois Anti-Injunction act of 1925 prohibits the issuance of injunctions in a case such as this, was fully considered and decided by us in Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union of Chicago, No. 753 (No. 24890.) The opinion in that case was filed while the present appeal was pending and in it we held the act of 1925 has no application to cases wherein there is no dispute between employer and employee." We might add that we delayed deciding this case until the Supreme court decided the Swing case.

We are of opinion that the holding of our Supreme court in the Meadowmoor Dairies case is controlling on the matter before us.

The order of the Circuit court appealed from is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

40672

DONALD F. MOORE,
Appellant,
vs.
MARGARET E. KELLY,
Appellee.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

301 I.A. 608

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for $575 commission alleged to be due for services as a real estate broker. Defendant answered, denying the employment and denying the commission was earned or due. There was a trial by the court. At the close of plaintiff's evidence on defendant's motion there was a finding for defendant with judgment, from which plaintiff appeals. The question for decision is whether the evidence was sufficient prima facie to justify a finding for plaintiff.

The evidence tended to show that plaintiff is a licensed real estate broker and defendant was the owner of a two-flat building known as 8232 Marshfield avenue in Chicago, in one of which flats defendant lived; that in the fall of 1937 defendant went to plaintiff's place of business in response to an advertisement of a four-flat building which was for sale. She told the salesman that she could not purchase a four-flat building unless she first sold the two-flat building she then owned. She thereupon listed her two-flat building with plaintiff for sale at the price of $11,500. On October 31, 1937, plaintiff advertised this building with other two-flat buildings for sale, and in response to the advertisement Mr. Differding came to the office of plaintiff where he saw Mr. Thompson, a salesman, who gave him a list of these two-flat buildings including that of defendant. On the same day Mr. Differding came back to the office and said he was interested only in the property of defendant. He asked for an appointment on

November 2nd for the purpose of inspecting the building. The salesman took the buyer through the building. Defendant was present and assisted by showing the apartment in which she lived to the prospective purchaser. On the afternoon of the same day Mrs. Differding came to the building and inspected it with defendant's knowledge. On November 3rd, by appointment, Differding returned with his father and made another inspection, also with the knowledge of defendant. On that day Differding signed a contract to buy at the price of $10,500. This contract was presented to defendant by the salesman, but she said she wanted time to consider and finally refused to accept it. On November 9th Differding offered $10,750 for the building and signed another contract, which the salesman again presented to defendant, who did not sign, saying again she wanted time to consider. November 11th she rejected this offer, and asked plaintiff's salesman if he could not get her an offer of $11,000, the purchaser to assume the 1937 taxes. November 12th, at a conference in plaintiff's office, Differding said he would pay $11,000 and "if necessary, 1937 taxes." Another contract was then drawn with the price left blank, and presented to defendant who again asked time to consider. The salesman and the buyer were both at the time at defendant's home. The salesman suggested that they go away and return in an hour; they did so, and when they returned defendant said she could not make up her mind. Differding thereafter told the salesman not to bother him again until defendant was ready to sign the contract. A week later the salesman called defendant by 'phone. She said that she had not yet made up her mind. However, on December 15th, without notice to plaintiff, she sold the premises to Differding for $11,300 in cash.

The motion of defendant for a finding in her favor was in the nature of a demurrer to the evidence. (First National Bank

v. Northwestern Bank, 152 Ill. 296.) The motion admitted what the evidence proved and what it tended to prove. (Helm v. Commercial Men's Assoc., 279 Ill. 570.) A principal cannot divest himself of liability in a case like this by closing the deal herself behind the broker's back. If she accepts a purchaser procured by the broker either on terms previously rejected or upon modified terms thereafter agreed upon, the commission is earned when a valid contract is entered into between the principal and the purchaser. (Day v. Porter, 60 Ill. App. 386; Wilson v. Mason, 158 Ill. 304.)

Defendant says there was no proof of the reasonable value of the services performed. This issue can hardly be said to be in dispute. If, however, evidence were needed to this point it could in a case where a jury was waived, as here, be heard even in this court under section 92 of the Civil Practice act. (Smith-Hurd Anno. Stats., chap. 110, par. 216, pp. 419-420, 1 (d).) We find no basis in the evidence for defendant's suggestion that plaintiff was not loyal to her in the transaction.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

40693

THOMAS N. PAPADOPULOS,
Appellant,

vs.

ANNA C. O'CONNELL as Administratrix of the Estate of William L. O'Connell, Deceased, et al.,
Defendants Below,
CHARLES H. ALBERS, as Receiver, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

301 I.A. 609

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, sued Albers, successor receiver, and Anna C. O'Connell, administratrix of the estate of William L. O'Connell, on a claim for commissions. He filed an amended complaint in two counts. A motion by Albers to strike the complaint was denied by Judge Gridley. Albers, successor receiver, then answered. By agreement of the parties the issues as to defendants were tried separately. The cause between plaintiff and the receiver came on for hearing before Judge Niemeyer and a jury. By agreement a juror was withdrawn. Albers then made a motion to vacate the order of Judge Gridley and to strike the complaint. This motion was allowed. The complaint was stricken with judgment in favor of Albers, receiver, and plaintiff has appealed.

Plaintiff complains that Judge Niemeyer overruled Judge Gridley. The statement is not accurate. Judge Gridley considered the amended complaint which named as defendants both the Estate of O'Connell and the receiver. When Judge Niemeyer considered the complaint the only defendant was the receiver. The complaint in substance charged that O'Connell when receiver of said banks through two of his employees requested plaintiff to secure a purchaser at a named price for certain real estate belonging to the banks; that plaintiff procured such a purchaser and by letter notified O'Connell, as receiver, enclosing a check for $2500 for

earnest money; that the then receiver untruthfully informed him that the property had been already sold and returned the check. The complaint says the then receiver thereupon presented to the court and secured its approval of another and lower bid and consummated the sale at the lower price. The question for decision is whether these averments of fact against O'Connell, personally and as receiver, state a cause of action against Albers as the successor receiver.

We hold that it does not for the reason that O'Connell, receiver, was wholly without power or authority to sell the real estate of these banks except as he was given authority so to do by order of the court. The complaint does not aver any such authority and for that reason is fatally defective. The complaint shows that O'Connell was appointed receiver by the State Auditor, in conformity with section 11 of the Banking Act (Illinois State Bar Stats. 1939, chap. 16½, p. 233. Section 11, which grants to the Auditor power under certain circumstances to name a receiver, in part says: "Such receiver, under the direction of the Auditor, shall take possession of and for the purpose of the receivership, the title to the books, records and assets of every description of such bank, and shall proceed to collect all debts, dues and claims belonging to it, and <u>upon the order of a court of record of the county in which the said bank is located may sell or compound all bad or doubtful debts, and on a like order may sell the real estate and personal property of such bank on such terms as the court shall direct</u>."

The briefs do not disclose that this part of this section of the statute has ever been construed by the courts. Plaintiff cites <u>Coy v. Title G. & T. Co.</u>, 198 Fed, 275-280, and <u>Gunn v. Ewan</u>, 93 Fed. 80, 81-2 (CCA 8), to the point that a receiver has power to employ others to assist him in the performance of his duties.

We do not question this is true as to clerical duties, but these cases come far from construing any portion of the statute of this State from which the receiver here derived his authority. Plaintiff also cites Crown C. P. Corp. v. Bates, 37 F. (2d) 508, to the point that the president of a corporation has power to employ an agent to sell its real estate although such sale must be made subject to the approval of the board of directors. This case is not analogous and does not purport to construe this statute. In the absence of any averment that the employment of plaintiff was authorized by the court, the complaint failed to state a cause of action against Albers, receiver. We think, too, the complaint failed to state a cause of action for another reason. Plaintiff sets out verbatim correspondence between O'Connell as receiver and himself with reference to this matter, and plaintiff's letter transmitting his offer shows affirmatively that he was acting in this matter for his client, Charles Samares. In other words, the letter negatives any employment of plaintiff by O'Connell to secure a purchaser of the property. This letter, too, says acceptance of the offer is subject to approval of the Auditor's office "and entry of an order authorizing such a sale." This shows plaintiff knew a court order was a condition precedent to any sale. Plaintiff's letter goes on to state: "I am to be paid for my services when deal is consummated usual real estate broker's commission." There is no averment that the deal was ever consummated.

The motion to strike was properly sustained. The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

40651

GEORGE B. MULLOY,
Appellant,

vs.

CONSOER, OLDER & COLMAN, INC.,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

230A

301 I.A. 609

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Plaintiff in his declaration alleged that he was employed by defendant as an industrial engineer at a minimum salary of $6000 a year for two years, and in addition a fee equal to one-third of the net profit of defendant's industrial engineering department; that he faithfully performed his duties under the contract and was paid a salary of $6000 a year during the life of the contract, but that defendant refuses to pay to him one-third of the profit of its industrial engineering department; that this profit at the end of the two years amounted to $150,000, and plaintiff is entitled under his contract to one-third of this, or $50,000, which defendant refuses to pay.

Motions were made by both parties, setting forth in substance that the matters of account in controversy were complicated and involved and necessitated the examination of numerous books, ledgers and other records; pursuant to this Benjamin B. Cohen was appointed a referee to examine these records and to take evidence and report the same to the court with his findings and conclusions, pursuant to section 68 of the old Practice act.

Although plaintiff contends that he was entitled to a jury trial, the record shows that both parties agreed to this order appointing Cohen referee. Evidence was taken before the referee, who made his report finding that plaintiff had been paid his salary of $6000 a year; that the defendant's department

paid his salary of $6000 a year; that the Internal's department

of industrial engineering sustained a loss during the contract period, hence no profits were earned and plaintiff was not entitled to recover, and recommended a finding for defendant; exceptions to this report were filed by plaintiff, which were overruled and the court approved and confirmed the report of the referee and entered judgment for defendant, from which plaintiff appeals.

Plaintiff asserts that he was denied the right of trial by jury; that after the evidence was heard and the report made by the referee plaintiff made a demand for a jury trial, which was denied him.

The briefs of the parties contain many statements concerning the practice under the Chancery act and under section 68 of the old Practice act and section 61 of the new Practice act. We do not think it would avail to consider these statements. We shall rest our conclusion as to plaintiff's right to a trial by jury upon the order of December 11, 1933, to which both parties consented; they agreed that the cause be referred to Benjamin E. Cohen as referee to take evidence and exhibits and report the same to the court with his findings, and "that said reference be on the same terms and conditions as a reference to a master in chancery and that neither party shall have the right to file and argue objections and exceptions." By this both parties agreed that the referee's findings should be subject only to objections and exceptions and the ruling of the court. Parties have the right to waive a jury trial, and the effect of this order was to waive a trial by jury. A similar matter was involved in Garrity v. Hamburger Co., 136 Ill. 499, where the court discharged the jury and referred the case to auditors; complaint was made that this deprived the parties of the right to a trial by jury. It was held that when the appellant acquiesced in and consented to the reference, it was in substance a waiver of the right to trial by jury. This practice was approved in the later case of Continental Beer Pump Co. v. Cooke Co., 299 Ill. 104.

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[illegible]

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our [illegible]

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[illegible]

to [illegible]

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ditions [illegible]

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tions."

should be [illegible]

of the [illegible]

effect of [illegible]

was involved [illegible]

court dis[illegible]

plaint was [illegible]

trial by jury. [illegible]

and consented to [illegible] in

the right to trial by jury. This practice was [illegible] in the later

case of Continental Beer Pump Co. v. Cooke Co., 295 [illegible]

It is claimed in defendant's brief that the evidence supports the finding of the referee that the defendant sustained a loss over the period of contract and that also defendant's industrial engineering department, operating as Industrial Operations Co., had sustained a loss. Plaintiff in his declaration asserted that the industrial engineering department made a net profit of $150,000 over the period of two years included in the contract. Although defendant's brief undertakes to show in great detail that, contrary to plaintiff's claim, defendant's Industrial Operations company sustained a loss, plaintiff does not gainsay this except by assertions. No attempt is made by reply brief to meet the figures presented by defendant showing a loss.

It goes without saying that plaintiff cannot recover unless he proves by the greater weight of the evidence that defendant made a profit in which he was entitled to share. It is a fair inference that he has abandoned any attempt to show by evidence that defendant or its subsidiary made any profits. This being the fundamental fact which plaintiff was bound to prove, the judgment of the trial court in favor of the defendant was proper.

Plaintiff questions the allowance of $254.70 to the referee as his fees and says they should have been taxed at the rate of $5 a day, which is the amount allowed to masters in chancery. The record does not show any evidence or proof before the court as to this point. We cannot review the judgment of the court below when there is no showing as to what was before the lower court in determining the matter. Moreover, the transcript shows many instances where proceedings were not made of record, and examination of witnesses is not shown as they were stricken by stipulation. There is not sufficient before us to justify any disagreement with the trial court in taxing the fees.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40665

GOLDIE RICHARDS,
Appellee,

vs.

MOHAWK COUNTRY CLUB,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

301 I.A. 610

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for $500 in an action for personal injuries tried before the court without a jury.

Defendant operated a private golf club known as the Mohawk Country Club, and on July 12, 1930, was conducting a social affair known as Derby Day upon its grounds. It had erected a tent a short distance from the clubhouse, supported by ropes fastened to stakes driven into the ground. Plaintiff, an invitee, who had never been to this club before, was injured about 11 p. m. as a result of tripping over one of these ropes or stakes.

Plaintiff contends that the grounds were inadequately lighted and that no warning was given her, while defendant says the greater weight of the evidence proves it violated no duty owed to plaintiff and that she was guilty of contributory negligence as a matter of law. The trial court held with the plaintiff.

The clubhouse faced south. On its west side was a walk leading from the parking space on the south of the grounds to the west entrance of the clubhouse; also on the west was a screened porch about 100 feet long, the width of which extended about 12 feet to the west; the enclosure of the porch was level with the floor of the clubhouse; the walk ran north and south parallel to the porch; there was one step from the porch onto a stub walk that led from the west entrance to the main walk; the distance from the porch to the walk was about 14 feet, and the walk itself was about

porch to the walk was about 14 feet, and the walk itself was about
led from the west entrance to the main walk;
the porch; there was one step from the porch
floor of the dark room; [illegible] to
feet to the west; [illegible]
porch about [illegible]
west entrance [illegible]
leading [illegible]
matter [illegible]
plate [illegible]
greater [illegible]
it [illegible]
never [illegible]
to [illegible]
[illegible] country
[illegible]
[illegible]
[illegible]

6 feet wide; a hedge about two feet high extended along the west side of the walk with an opening in it opposite the porch entrance estimated by different witnesses to be between 4 and 12 feet in width; the opening in the hedge permitted people to go out on the lawn, which was to the west of the walk; a putting green was to the north of this opening and a children's playground about 30 feet to the south, and beyond this and to the west were trees.

The tent was located in a clearing about 60 feet wide and 100 feet long on grounds just west of the hedge known as the orchard; the tent was about 50 feet long, 30 feet wide and 15 feet high and stretched from east to west; it had no sides and was held up by three ridge poles and fastened by 20 or more five-eighths inch ropes stretched around the tent at intervals of about 8 feet and attached to stakes driven into the ground about 7 feet from the tent's edge. The distance from the opening in the hedge to the east edge of the tent was variously estimated by witnesses at between 7 and 8 feet, as testified by defendant's greenskeeper, and 15 and 20 feet as testified by plaintiff's husband. There was also some dispute as to location of the first two guy ropes running west from this opening in the hedge. Witnesses for defendant said one was fastened right in the corner bushes of the north hedge, and the other, over which plaintiff apparently tripped, in the corner bushes of the south hedge. A witness for plaintiff testified that the guy rope over which plaintiff tripped was almost 10 feet south of the opening and two or three feet west of the hedge. To go to the tent from the clubhouse one would walk west on the stub walk, cross the main walk, go through the opening in the hedge onto the lawn and enter the tent between the two guy ropes fastened to the stakes in or near the hedge, going a total distance of about 35 feet.

The night in question was very warm and there were several hundred people attending the social affair, most of whom were in the clubhouse watching the entertainment at the time of plaintiff's

6 feet wide; [illegible]

side of [illegible]

[illegible]

width; [illegible]

[illegible]

north [illegible]

the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

the other,

[illegible]

the guy [illegible]

of the [illegible]

the tent [illegible] were

the main walk, [illegible] among

and enter [illegible] these

in or near [illegible]

The night in question was very [illegible] were several hundred people attending the social affair, most of whom were in the clubhouse watching the entertainment [illegible]

accident. Mrs. Quick, a member of the club, testified that earlier in the night she had seen the plaintiff - an old acquaintance - in the clubhouse, and that just before the accident she, Mrs. Quick, came out of the clubhouse and walked along the walk east of the hedge; that at this time another lady called to plaintiff to come over to where Mrs. Quick and this lady were standing and that plaintiff, who was then on the lawn to the west, did so; Mrs. Quick said she was standing on the east side of the hedge and close to it, about two feet south of the opening in the hedge which led from the west entrance of the clubhouse onto the lawn where the tent was located; plaintiff stood in front of Mrs. Quick but on the west side of the hedge; Mrs. Quick said she saw the guy rope running from the tent down to the edge of the hedge, and that plaintiff was standing just south of it; that they talked for several minutes when someone called to plaintiff and said they were going home; that plaintiff turned toward the north and at that time tripped or fell without taking any steps.

Plaintiff testified that just before the accident she was sitting on the lawn about 10 feet west of the hedge; that Mrs. Quick came up to the hedge and called her and that she got up to pass over the lawn to speak to Mrs. Quick who was standing on the east side of the hedge; plaintiff was standing opposite her, to the west of the hedge facing east; she said she did not know she was standing close to a guy rope and did not see the rope leading from the tent; she talked a few minutes and then, "I went to turn around to go out. As I turned I caught my foot in this stake - this guy rope there inside the hedge. I tripped on my foot. I didn't even take a step before I fell over the guy rope. The rope was not visible." Plaintiff suffered a dislocated elbow and torn ligaments and considerable injury to the soft tissues around the elbow joint, which at the time of the trial had almost healed,

accident. [illegible] carrier
in the [illegible]
in the [illegible]
quick, came [illegible]
of the [illegible]:
to come over [illegible]
that [illegible]
quick [illegible]
close to it, [illegible]
which [illegible]
where [illegible]
quick [illegible]
the [illegible]
an [illegible]
for [illegible]
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sitting [illegible]
quick [illegible]
pass over [illegible]
east in [illegible]
the west [illegible]
was standing [illegible]
from the [illegible]
around to go [illegible]
this guy rope [illegible]
didn't even [illegible]
was not viable." Plaintiff [illegible] and torn
ligaments and considerable injury to the soft tissues around the
elbow joint, which at the time of the trial had almost healed.

but with some limitation in the movement of the arm.

Was the defendant club negligent in failing to provide sufficient light on its club grounds, or was plaintiff negligent in failing to observe the stake in the ground and the guy rope leading from the stake in the ground up to the tent above?

Keller, defendant's greenskeeper, testified that on the screened porch of the clubhouse were four dome lights, which, however, did not throw much light; he said that in preparation for Derby Day night he had placed a 200-watt light - plain bulb with no reflector - over the west door of the porch about 16 or 18 feet above the ground; that the distance from this light to the walk was about 14 feet, the walk itself was about 6 feet wide, and next to the walk was the hedge, immediately to the west of which plaintiff met with the accident. He said that in the tent, which had no sides and whose east edge was about 7 or 8 feet west of the hedge, three 200-watt lights were lighted, one in the center and one on each ridge pole about 12 feet above the ground; located near the west end of the tent was a bar; one of these lights was slightly to the east of the bar and the other two lights east of that; that the distance from the easternmost light under the tent to the hedge was about 20 feet. In addition to these lights Keller had strung six very small colored lights among trees in the orchard a short distance to the south of the tent where chairs had been placed for the guests, but these lights did not illuminate the ground.

Mrs. Quick testified for the defendant that she had not been in the tent that night but could see a reflection from the lights in the tent; that there was a light on the west side of the clubhouse over the door; that although the place where she and plaintiff were standing at the time of the accident was not bright, yet it was light enough to see; she said she was able to see the folks

but with [illegible]

sufficient [illegible]

in talking [illegible]

few [illegible]

[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

placed [illegible]

[illegible]

in the [illegible]

in the tent; [illegible] close-

house over the [illegible] edge [illegible] sufficiently

were standing at [illegible] of the accident was [illegible], yet it

was light enough to see; she said she was able to see the folks

that were sitting in the chairs on the lawn and to decide who was coming toward her, and also that she saw the guy rope in front of her over which plaintiff fell.

All the witnesses who testified for plaintiff were in her party. Vera Luthardt said they were seated in chairs between the tent and the hedge - about 10 feet from the edge of the tent on the lawn west of the clubhouse; that there was no light on the building, but one inside which did not throw any light toward them, and there was not much light coming from the tent; although the ropes were not particularly visible, she saw them all around there holding the tent up, and saw them when she first came - "naturally every tent has ropes" - but you could not see them close to the ground - it was too dark; she would say it was dark where plaintiff fell. Martha Dustin also testified it was dark at the place where plaintiff fell; she said there was only one light in the tent - "an ordinary bulb like we burn at home"; she did not notice any lights on the outside of the clubhouse besides the one in the tent and the one "in the dome" of the clubhouse.

Mr. Richards, plaintiff's husband, testified that the hedge was about 30 to 35 feet from the doorway of the clubhouse; that there was an enclosed stoop some 5 feet wide leading from the west entrance into the stub walk that led to the north and south walk and in this stoop enclosure was an ordinary dome light; that there was only one light in the tent and this light was in the center, over an improvised bar; that this light was about 50 feet from the hedge and about 40 or 50 feet from where plaintiff was thrown to the ground; that a light from the clubhouse was reflected onto the lawn or the driveway; that there were no other lights on the outside of the club house to the west and it was very dark where plaintiff fell.

Plaintiff testified that there was a light under the center of the tent, but that there were no lights outside of the tent except

that were [illegible] was
coming [illegible]
of her own [illegible]
[illegible]
party. [illegible]
tent [illegible]
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the [illegible]

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about [illegible]
that [illegible] the
driveway; [illegible] club
house to [illegible]

Mr. Smith stabilized that [illegible] under the center
of the tent, but that there were no lights outside of the tent except

one light in the enclosed porch of the clubhouse; from the place where she was sitting on the lawn she could see the light in the tent, but did not notice any of the guy ropes; it was quite dark at the place where she fell as the only light was that which came from the tent and the dim light from inside the clubhouse through the windows.

There was owing to plaintiff, as an invitee, a duty on the part of defendant to use ordinary care for her safety while upon its premises. Pauckner v. Wakem, 231 Ill. 276.

The question presented was purely one of fact. The trial court, seeing the witnesses and hearing them testify, was in a better position than are we to determine their credibility. The circumstances show a confusing situation. We cannot say that the trial court's action in holding the defendant negligent and plaintiff free from contributory negligence is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

40646

ANDREW BEDNARCZYK,
Appellee,

vs.

ROZALIA KUDLA, a widow, et al.,
Defendants.

MATILDA YOELIN, Administratrix,
etc.,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

301 I.A. 610

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 5, 1936, plaintiff filed his bill to foreclose the lien of a trust deed executed in 1923 by John and Rozalia Kudla (the former since deceased.) Matilda Yoelin, individually and as administratrix of the estate of Michael Gorski, deceased, was made a party defendant. The case was referred to a master in chancery who took the evidence, made up his report and recommended that a decree of foreclosure be entered as prayed for in the bill. His report was approved by the chancellor, a decree was entered, and Matilda Yoelin appealed to the Supreme court. That court transferred the cause here, holding that a freehold was not involved. Bednarczyk v. Kudla, 370 Ill. 204.

The defense interposed by Yoelin in the trial court and urged here is that plaintiff's claim was barred by the ten year Statute of Limitations; that the trust deed was executed without consideration to evade the claims of creditors, and that the suit in the instant case was filed in collusion with Rozalia Kudla, the owner of the equity of redemption, to forestall the appointment of a receiver for the same property in another suit then pending.

The record discloses that March 17, 1923, John Kudla and Rozalia Kudla, his wife, executed their three notes, one for $3,000 due one year after date, one for $3,000 due two years after date,

and a third for $2,000 due three years after date. They also executed their coupons to evidence semi-annual payment of interest, and to secure the payment of the notes executed their trust deed of the same date conveying the property in suit, which was registered in the office of Registrar of Titles of Cook county March 24, 1923. Note #1 was paid at maturity. March 17, 1925, the Kudlas executed a written instrument extending the time of payment of note #2 for one year; a similar extention agreement was executed by them March 17, 1926, and another extension agreement dated March 17, 1927, by which time of payment of note #2 was extended three years from that date. March 17, 1930, they signed another extension agreement extending the time of payment of note #2 for three years, and on March 17, 1933, another extension agreement between plaintiff and the Kudlas was executed extending the time of payment for one year. At the time of the execution of each extension agreement the Kudlas executed their semi-annual interest coupon notes for the proper amounts of semi-annual interest. Similar extension agreements were executed by the Kudlas in reference to note #3 for $2,000, and interest coupons were likewise executed by the Kudlas on each occasion. June 29, 1934, plaintiff and Rozalia Kudla (John Kudla having died prior to that time) executed a written agreement which recites that plaintiff was the legal owner of the two promissory notes, describes the trust deed given to secure the payment of them, and the time of payment of the remaining amount due under the mortgage ($5,000) was extended two years from March 17, 1934. The agreement further provided that Rozalia Kudla pay $65 every month on account of delinquent taxes on the property until they were paid. She also executed interest coupon notes so that the $5,000 became due and payable March 17, 1936.

The evidence further shows that Michael Gorski's claim against John Kudla for workmen's compensation was allowed May 16, 1924, for injuries sustained by Gorski in 1921, and on December 16,

and a third [illegible]

executed [illegible]

and to [illegible]

of the [illegible]

turned [illegible]

1922. [illegible]

executed [illegible]

note [illegible]

by [illegible]

17, 1927, [illegible]

[illegible]

also [illegible]

[illegible]

plus [illegible]

for [illegible]

[illegible]

notes [illegible]

[illegible]

note [illegible]

the [illegible]

India [illegible]

ten [illegible] order

of the [illegible]

secure [illegible]

ing amount [illegible]

from Barcelona, [illegible]

India may [illegible]

property [illegible]

notes so [illegible]

The evidence further shows that plaintiff's claim against John India for workmen's compensation [illegible] filed May 16, 1924, for injuries sustained by Gorski in 1921, and on December 16,

1930, he filed a bill to subject Kudla's property to the payment of his claim.

On the hearing before the master plaintiff offered the two principal notes, interest coupons, trust deed, extension agreements, etc., and evidence to the effect that he had paid $5,000, the face of the two notes, and the unpaid interest at the time he purchased them, July 9, 1931.

Defendant Yoelin in her answer denied that the Kudlas executed the notes and mortgage in 1923 to evidence their indebtedness, but averred that the mortgage was given by John Kudla, assisted by his wife Rozalia, to evade payment of the award of Michael Gorski for workmen's compensation; but on the hearing she offered no evidence to sustain these allegations and obviously such pleaded defense avails her nothing. Plaintiff made out a prima facie case by introducing the notes, trust deed and extension agreements.

Defendant further alleged in her answer that letters of administration of the estate of Michael Gorski were granted to her by the Probate court of Cook county on June 11, 1935, and that plaintiff did not exhibit any claim against Gorski's estate in the Probate court within one year. We think it clear that this allegation is wholly immaterial because plaintiff makes no contention that he had a claim of any kind against the estate of Gorski.

Defendant further contends that plaintiff was barred from foreclosing the mortgage by sec. 11, chap. 83, Ill. Rev. Stats. 1939. That section provides: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues." In support of this counsel says: "An extension of maturity date of trust deed is of no effect as to a judgment creditor of the maker when it is not registered or recorded, and the trust deed contains no provision for such extension." In

1920, [illegible] subject [illegible] to
of his [illegible].

two [illegible]
[illegible]
[illegible]
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by [illegible]
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[illegible]
Probate [illegible]
the [illegible]
he had [illegible]

Therefore [illegible]
That section [illegible]
a sale to [illegible]
mortgage, unless [illegible] to make such sale [illegible]." It appears of [illegible] "An extension of maturity date of trust deed is of [illegible] to a judgment creditor of the maker when it is not registered or recorded, and the trust deed contains no provision for such extension." In

Kraft v. Holzmann, 206 Ill. 548, it was held that an agreement extending the time of payment of the indebtedness secured by a trust deed need not be recorded. The court there said (p. 550): "The extension of the time of payment of the note extended the time within which the deed of trust could be foreclosed. To have that effect it was not necessary to record the extension agreement. The deed of trust was of record and not released, and persons dealing with the land were bound to take notice of it, and ascertain, at their peril, whether the indebtedness it secured had been paid or barred."

Defendant further contends that since the creditor's bill was filed in 1930 to subject John Kudla's property to the lien of the award made to Michael Gorski under the Workmen's Compensation law, and the decree was entered in that case prior to the time plaintiff acquired the notes and trust deed involved, plaintiff's rights are subordinate to the Gorski decree. The master found, and his finding was confirmed by the chancellor, that the creditor's bill did not seek to set aside the trust deed and therefore the lien of it was in no way affected by the creditor's bill. We agree with this conclusion.

Defendant further contends that the master's report, which was approved by the decree, is based on conflicting evidence and that the evidence offered by plaintiff shows that the trust deed was not given to secure a bona fide loan and was not afterward purchased by plaintiff, and therefore the decree ought not to stand. We have examined the evidence in the record and are of opinion we would not be warranted in disturbing the decree, the master and chancellor having agreed as to the facts. Under the law, when the findings of the master are approved by the chancellor they will not be disturbed unless manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491; Stasch v. Stasch, 355 Ill. 581; Kosakowski v. Bagdon, 369 Ill. 252.

Whether some of the things [illegible] incompetent to testify, as defendant contends, [illegible] need not be passed upon here because plaintiff proved his case by [illegible] competent evidence and there was no defense.

The decree of the circuit court [illegible] is affirmed.

DECREE AFFIRMED.

Latchett, P. J., and Churchill, J., concur.

40556

LOUIS M. LITMAN, Successor Trustee, Substituted Plaintiff in lieu of Central Republic Trust Company, as Successor Trustee, Plaintiff, v. JEREMIAH W. DOWD, et al., Defendants, SARA M. DEWEY, SARAH MINOGUE and HARRY FLYNN, (Defendants) Appellants, v. CHARLES E. BARTLEY, et al., Appellees.	APPELLATE COURT FIRST DISTRICT, COOK COUNTY. 301 I.A. 61

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This cause has been consolidated with cause No. 40555, of this court, which bears the same title as this case, and in the aforesaid cause we have today filed an opinion. As stated in the opinion filed in Cause No. 40555, it is necessary that we consider these causes separately.

The abstract in this cause contains the following provision:

> "Transcript contains all of documents abstracted above in No. 40555, except the Foreclosure Decree, Objections to Sale, Decree Confirming Sale," etc.

An abstract of record should be something more than a mere index. Its purpose is to set forth the evidence from the documents and everything counsel wishes the court to review. However, in so far as we could, we have gone over this matter and we find nothing which would indicate that anything other than substantial justice has been done.

For the reasons herein given the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

40585

CITY OF CHICAGO, a Municipal Corporation,) APPEAL FROM
Plaintiff - Appellee,) MUNICIPAL COURT
v.) OF CHICAGO.
WESTERN SHADE CLOTH COMPANY, a Corporation,)
Defendant - Appellant.)

301 I.A. 611

MR. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

A judgment in assumpsit was entered in the Municipal Court in favor of plaintiff for the sum of $427.00 for fees claimed to be due plaintiff for inspection of ventilation apparatus maintained by the defendant in its factory, from which judgment defendant brings this appeal.

Defendant's motion to strike plaintiff's statement of claim was overruled and defendant answered.

Plaintiff's statement of claim alleges that between 1932 and 1936 the plaintiff made inspections of mechanical ventilation equipment used by the defendant in its factory, in accordance with the provisions of Section 2230 of the Municipal Ordinances, which provide that such a fee be paid for such inspection in the sum of $427.00 and which it is alleged the defendant refuses to pay.

Plaintiff filed a bill of particulars.

Defendant's motion to strike plaintiff's statement of claim was overruled, and thereupon defendant filed its answer in which it was stated:

1. Defendant denies that the inspections alleged were pursuant to ordinance of the city and that the inspections were made in accordance with the provisions of said ordinances.

2. Defendant further alleges by way of defense that the ordinances do not require this defendant to supply air by mechanical

ventilation to its employees and its factory in question, and that, even though said ordinance did provide for such, the amount of air to be supplied per minute to such employees and handled per minute by said equipment would be only 243[illegible] cubic feet and that the charge for such air so supplied by the terms and provisions of said ordinance for inspection, would be only the sum of [illegible]1.41 per year.

3. By way of further defense defendant says that the ordinances do not require that air be supplied to the employees in said factory by mechanical equipment and that said ordinances are complied with <u>without the use of any mechanical equipment</u>, and that the mechanical equipment in question was not used to change the air in the defendant's factory for the purpose of ventilation as provided by said ordinances but <u>was used merely to assist in the process of manufacture of the defendant's product</u>.

4. Defendant alleges by way of further defense, that the charge for making said inspection is not based upon the number of cubic feet per minute handled by the mechanical equipment inspected, as provided by ordinance, but is based upon the capacity of said equipment.

5. Defendant alleges by way of further defense, that the factory of the defendant need not necessarily be equipped with said equipment to comply in all respects with the ordinance concerning ventilation.

Plaintiff's theory of the case is that this mechanical equipment inspected was necessary under the terms of the ordinances "to supply comfort or human ventilation, as distinguished from process or business ventilation", in the defendant's factory, and that the charge made therefor is upon the basis allowed by the ordinance.

Defendant's theory of the case is:

ventilation to [illegible]

even though [illegible]

to be such [illegible]

by avoid [illegible]

for such [illegible]

for [illegible]

[illegible]

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[illegible]

[illegible]

in [illegible]

by [illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

ventilation.

[illegible]

equipment [illegible]

"to supply [illegible]

process of [illegible]

that the owner [illegible] is upon the [illegible] by the ordinance.

Delaunay's theory of the case is:

First. That this mechanical equipment inspected was used solely for the process or business ventilation of the defendant's product.

Second. That the employees of the defendant in the factory were supplied with the amount of air provided by the ordinances without the use of said equipment.

Third. That whether or not said equipment was necessary under the ordinance to supply air to the employees in the factory, the ordinance based the charge for inspection upon the amount of air supplied to the employees, and not to the product, per minute, and that upon this basis the charge for inspection should have been only $1.41 per year and not $85.40, as claimed.

The evidence in this case shows that these premises were used for the manufacture of window shades; that at times there were between 700 and 800 persons employed in the building; that part of the process of manufacture was to submerge certain cloth into a solution containing various chemicals and other ingredients and then dry said materials with fans which were also used to exhaust the air from the rooms, thus the ventilating apparatus was used for a twofold purpose; that this served to render the air in such condition as to be comfortable for the persons working in the premises; that no other ventilating system was employed for that purpose, except for a few small fans which were placed near some machines.

It is next contended that the judgment is contrary to the law and evidence and that improper evidence was admitted.

Where a case has been heard by a court without a jury, the presumption is that even though incompetent evidence was produced at the time of the trial, it in no way influenced the court in reaching its decision when sufficient and proper evidence is presented to justify the judgment. Merchants' Despatch v. Joesting, 89 Ill.

152; Kreiling v. Nortrup, 215 Ill. 195; Pratt v. Davis, 224 Ill. 300.

It is next contended that the judgment is excessive. We do not think the evidence admits of this complaint. Apparently the amount due was arrived at in accordance with the terms of the ordinance.

It is next contended that the ordinance is unreasonable, invalid and inapplicable to the defendant's factory. We do not think such objection tenable.

It is next claimed that the inspection fee imposed by the ordinance is unreasonable, and that it was intended for revenue purposes only.

Many other questions are raised by defendant but, as they are not controlling, we shall not extend this opinion by further discussing the same.

The evidence before us shows that inspectors from the city went to defendant's plant during a period of years and inspected the premises and the apparatus, and made measurements as to the necessary flow of air as required by the ordinance. We think a charge for this service is justified.

Counsel for defendant contends that we should adopt defendant's method of figuring in arriving at the amount which should be paid and that said amount should be for $1.11 instead of the amount of the judgment entered by the trial court. The evidence does not justify such figures. We think the trial court was justified in finding the amount of the judgment as the correct amount due, as shown by the evidence, and for the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

40599

KATHERINE GREYBAR,

Plaintiff - Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

301 I.A. 612

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Upon the verdict of a jury a judgment was entered against the Metropolitan Life Insurance Company and in favor of Katherine Greybar, plaintiff herein, for the sum of $1,015.00 as a death benefit on a life insurance policy which had been issued to the sister of plaintiff. It is from that judgment that this appeal is taken.

Plaintiff alleges that on June 1, 1936, defendant made, executed and delivered to Johana Kresek a policy of insurance in the sum of $1,000.00 and that on July 14, 1936, after the delivery of the policy, the plaintiff was named as beneficiary; that the insured died on April 15, 1937; that plaintiff has requested payment of said policy which defendant has refused to do.

Defendant contends that the policy was issued pursuant to a written application which was attached to and made a part of the policy; that said application was made May 22, 1936 and that in said application the insured represented that her answers to the questions were complete and true; that the insured denied having been attended by a physician or of having any treatment at any hospital, or of having any physical or mental defect or infirmity, serious illness, disease of the heart, syphilis, or that she had been sick since 1924, when she had salpingitis for two weeks; that the insured further stated at the time the application was made, that her condition of health was good.

Defendant further contends that the insured had been treated by Dr. Buck for syphilis and aortic aneurysm from January, 1936, until January 1937; that the insured had been in the Jackson Park Hospital from January 31, 1936, to February 2, 1936, where her condition was diagnosed as aortic aneurysm complicated by vascular syphilis and that if defendant had known of these facts it would not have issued its policy.

Defendant further contends that plaintiff attempted to show a waiver by the defendant of its right to void the policy because of misrepresentations contained in the application for the policy, and that under the law the plaintiff must allege waiver, which she failed to do.

Plaintiff's theory of the case is that the defendant failed to prove by a preponderance of the evidence that the insured made misrepresentations in the application for the policy as to her health and prior medical and hospital treatment.

Defendant's theory of the case is that it did.

A perusal of the evidence in this case shows the insured did not speak the English language; that the answers to interrogatories by defendant and upon which defendant relies, were made through an interpreter who was the sister of the insured and plaintiff herein; that the usual examination was made by the defendant's doctor and the replies which were made were wrongfully put down by him. Said doctor was not produced at the trial nor was the original record of the examination produced. The records of the hospital were produced which related to one "Jennie Kresek". We are at a loss to know whether they refer to Johana Kresek, as no proof is made in that regard. No attempt was made to explain that these two names refer to one and the same person. This statement may also be made with reference to the report of the doctor who testified as to the X-rays which were taken, - they too were made of "Jennie Kresek". Other hospital

[illegible]

treated by [illegible]

1936, until [illegible]

park [illegible]

condition [illegible]

syphilis [illegible]

not [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

did not [illegible]

by [illegible]

interest [illegible]

that the [illegible]

the reality [illegible]

doctor [illegible]

the examination [illegible]

which relied [illegible]

whether they refer to Johnny Krasso, so no [illegible] in that report.

No attempt was made to explain that there was [illegible] refer to one and the same person. This statement may also be [illegible] with reference to the report of the doctor who testified as to the X-rays which were taken, - they too were made of "Jennie Krasso". Other hospital

records were used to refresh the memory of another doctor who testified and that record also referred to a "Jennie Kresek". The name appearing on the application for insurance was that of "Johana Kresek". No explanation is made as to the difference in name.

Defendant relies solely upon the charge that the insured made false replies to questions asked her at the time the application for insurance was made, and defendant assuming the answers to be true, the policy for insurance was issued.

The application for insurance contained many questions, approximately 50 of which were set forth under the captions - Part A and Part B - each containing approximately 25 questions and the answers were affixed thereto. The policy contained a clause which stated:

> " * * * and all statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, * * * ."

A case very similar to the instant case is that of Janelunas v. Chicago Fraternal Life Assn., 286 Ill. App. 319, inasmuch as the insured was of foreign birth and could neither read nor write the English language and could speak but very little English. In an action by the beneficiary to recover on an insurance policy issued to the insured, this court speaking through Mr. Justice O'Connor, said:

> "A reading of (1) the benefit certificate * * * clearly shows that the statements made by the applicant, although stated to be warranties, were understood and intended by the parties to be mere representations, and if they were not literally true the question of the good faith of the applicant in making her answers was for the jury. Joseph v. New York Life Insurance Co., 219 Ill. App. 452; Minn. Mut. Life Ins. Co. v. Link, 230 Ill. 273; Moulor v. American Life Ins. Co., 111 U. S. 335; Globe Mut. Life Ins. Assn. v. Wagner, 188 Ill. 133."

We think the entire record being a disputed question of fact, it was properly left by the court for the jury's determination.

As was stated by Mr. Justice Hebel of this court in the case of Fendi v. Metropolitan Life Insurance Co., 294 Ill. App. 606, (Opinion not reported in full, Appellate Court No. 39625):

"The plaintiff contends th t in order to void a policy of insurance on the ground of fraud, the answers must not only be untrue, but they must have been made with reference to a material matter and must have been intentionally false.

* * * * * * *

while these facts were contradicted by the young woman cashier, they were questions of fact for the jury to pass upon, and no doubt, this was one of the elements considered by the jury in determining the question of whether the representations were made as they appear from the application for reinstatement."

Inasmuch as the policy and the record before us show that the answers given by the Insured were not considered as warranties, but were stipulated merely to be representations, the question as to whether or not they were truthfully answered, and all questions with relation thereto, were properly submitted to the jury for their consideration and determination.

It is next contended that the court erred in refusing to give certain of defendant's instructions and also erred in giving certain instructions of plaintiff to the jury. Some 35 instructions were submitted by the defendant in this case, which were entirely too many, as it placed too great a burden upon the trial court as well as this court to consider them. We do not think from a review of these numerous instructions that anything of vital or controlling importance has been either withheld from the jury or given to the jury which would unduly prejudice the defendant.

Finding no substantial error and for the reasons herein given, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

40612

CLARA SIEGEL and VERA CARROSO, Trustee,

Plaintiffs,

CLARA SIEGEL,

(Plaintiff) Appellee,

v.

MERCANTILE TRUST & SAVINGS BANK OF CHICAGO, a corporation, and BENJAMIN B. MORRIS,

Defendants.

BENJAMIN B. MORRIS,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

301 I.A. 612

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a first class contract suit in the Municipal Court of Chicago on January 2[illegible], 1938, seeking to recover from the defendants $4,518.98 which moneys it is alleged were the proceeds from two certain bank deposits with the defendant Mercantile Bank in the name of the plaintiff Vera Carroso, a savings deposit in the sum of $3999.00, together with the further sum of $13.33 interest thereon, and a balance in the sum of $519.98 in a checking deposit. The defendant Morris filed a written motion to strike the statement of claim and dismiss the suit as to him, which motion was overruled. He then filed a statement of defense. A trial was had by the court without a jury which resulted in a finding in favor of the plaintiff Siegel and against the defendant Morris, and a judgment in the sum of $4,954 and costs was entered on the finding. Apparently the evidence upon which the trial court based its finding was that Morris commenced a garnishment suit against Vera Carroso, making the Mercantile Trust & Savings Bank a party defendant. Judgment was entered after hearing in favor of Morris and against the

bank. Morris sued out an execution and obtained the money from the bank. Clara Siegel, plaintiff here, claimed that the money belonged to her and not to Vera Carroso but that the same was held by Vera Carroso as trustee. On an appeal to this court the judgment was reversed and the cause was remanded with a finding that the money properly belonged to Clara Siegel and not to Vera Carroso. It is to obtain this money from Morris that Clara Siegel brings this suit.

The defendant Morris appeals from such finding and judgment, as well as from the orders denying his motions for a new trial and in arrest of judgment, and the prior order overruling his motion to strike the statement of claim and dismiss the suit as to him.

Motions were made by the defendant Morris while this suit was pending in this court, to dismiss the cross-appeal as to Vera Carroso, trustee, which was reserved to a hearing. Said motion is denied.

The parties involved in this cause were in this court on a former appeal being case No. 39284, and at that time the second division of this court filed an opinion wherein the decision was adverse to the appellant here. The controlling facts are the same in both cases. In the former opinion it was decided that the money, which is the subject-matter of the litigation here, was properly the money of Clara Siegel, the intervening petitioner. That opinion stated:

> "It was conclusively established not only by the testimony of the witnesses but by the draft and check in evidence that the money deposited in the garnishee bank for which it accounted in its answer was the money of the intervening petitioner, brought by her from Boston for the purpose of entrusting it to the care of her sister or brother-in-law or both, and it was just as conclusively established by the testimony of the witnesses and the checks in evidence, which were drawn against the checking account in the garnishee bank by Vera Carroso for the sole benefit of Clara Siegel, that the former was merely the trustee of the funds deposited in said garnishee bank and that such funds constituted a trust fund of which the intervening petitioner [Clara Siegel] was the sole beneficiary.

> A judgment creditor has no greater right to the property in the hands of the garnishee than has the judgment debtor and it is only the judgment debtor's property and credits which can be reached by process of garnishment, not the property and credits which he has in trust for others. (Hair v. North Western Nat. Bank, 50 Ill. App. 211; Gandridge v. Northern Trust Co., 318 Ill. App. 138.) The money in the accounts in the garnishee bank in the name of Vera Carroso, one of the original judgment debtors, was not subject to garnishment for the payment of the obligation of the said Vera Carroso since it was clearly shown to be the money of the intervening petitioner and held in trust for her by her sister."

The finding of fact as set forth above is controlling in the instant case. That being true, further discussion is unnecessary as we are controlled by the facts as found on the former appeal. In obtaining the money from the bank, by execution or otherwise, Morris received the money of Clara Siegel and not the money of Vera Carroso who was the judgment debtor. The court did right in entering judgment in favor of plaintiff Clara Siegel and against the defendant Morris.

For the reasons herein stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND BURKE, JJ. CONCUR.

40634

H. W. TWIEHAUS, as Trustee,

Appellee,

v.

5635 WINTHROP BUILDING CORPORATION, et al.,

Appellees.

On Appeal of HENRY B. RYAN COMPANY, a corporation, JOHN C. BROOK, as Trustee, and PROVUS BROS. INCORPORATED, a corp.,

Appellants.

APPEAL FROM

CHANCERY COURT

COOK COUNTY.

301 I.A. 613

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendants bring this appeal from an order entered on August 19, 1938, approving a master's report of sale in a real estate mortgage foreclosure proceeding, and from an order entered on September 16, 1938, dismissing for want of equity the defendants' petition seeking the vacation of the order of August 19, 1938, and seeking the disapproval of the master's sale.

No evidence was heard by the court in connection with the entry of either order, although the court had made an issue between the parties by ordering answers to be filed to said petition.

The motion of Thelma Carlin, one of the appellees, to dismiss the appeal was reserved to a final hearing. Said motion is hereby overruled.

In substance the pleadings show that the master's report of sale discloses a sale of the real estate for $145,000.00, and recites that the bidder did not pay anything either in cash or bonds, as the decree directed, but that said bidder "is prepared to deposit" with the master, the full amount of his bid; and the master reports that "upon approval of his report of sale, and upon receipt from such bidder of the full amount of his bid", that the master will deliver to the purchaser a certificate of sale.

Defendant Provus Bros., Incorporated, a party in interest, filed its objections to the master's report, giving as a ground therefor - that the property was not sold for cash, and that the purchaser at the sale did not pay any cash, or apply any bonds and interest coupons on account of his bid. These objections were overruled on August 19, 1938.

On September 14, 1938, less than 30 days thereafter, the defendants - appellants John O. Snook, as trustee, Henry B. Ryan Company, and Provus Bros. Incorporated, filed their petition and entered their motion of record, seeking the vacation of the order of August 19, 1938, approving the sale, and seeking the disapproval of the sale.

In their petition filed September 14, 1938, the defendant-appellants allege the following:

> "John O. Snook, as trustee, owns the fee simple title to the real estate described in the decree. The beneficiaries of the trust whereunder he holds title, are the defendants Henry B. Ryan Company, and Provus Bros. Incorporated.
>
> At the master's sale, held on July 25, 1938, one Warren Browne bid $145,000.00 for the real estate. This sale was approved by the court on August 19, 1938."

The bid of $145,000.00 has not been paid, either in whole or in part.

Continuing the petition in substance alleges that the sale was improper, of no legal effect, and void, because no part of the purchase price of $145,000.00 was paid either at or before the time of sale, or on the day of sale, or at any time prior to the approval of the sale on August 19, 1938, or at any other time.

Under the statute the defendants herein are entitled to redeem from any master's sale held in this proceeding, which right to redeem commences on a certain date, and such rights should not be prejudiced by an incomplete, uncertain and invalid sale.

The petition concludes with a prayer th t the order of August 19, 1938, approving the master's sale, be vacated, and that the sale be disapproved, and a re-sale ordered.

Neither the complainant in the foreclosure proceeding, nor the purchaser at the master's sale, answered the petition of the defendants, and but three bondholders answered. These answers do not deny the nonpayment nor do they deny a deposit was not made as partial payment of the bid at the master's sale.

The trial court as before stated considered the petition insufficient in law, refused to hear evidence, and dismissed the petition for want of equity.

It appears from this record that the master in chancery went through the form of complying with the decree of sale, which provided that the property be sold for cash or bonds owned by the bondholders, but received neither cash nor bonds. He reported the same to the court and stated that the purchaser was prepared to deposit with the master the full amount of his bid, but did not say when this would be done or why it had not been done either in whole or in part on the date of the sale. Such a sale was not one for cash, as the decree provided. Masters should be very mindful in seeing that such provisions, as those here involved, are carried out in strict compliance with the court's decree, and courts should not approve the master's failure to do so. As was said in Barnes v. Swedish American Bank of Rockford, 371 Ill. 20., 28:

> "It was her (administratrix') duty, acting as an officer of the court, in conducting the sale of the premises, to comply strictly with the order authorizing the sale." Moore v. Sievers, 336 Ill. 316, 322; Ehrgott v. Seaborn, 363 Ill. 292.

It appears from the record in this court, that the master intended in the future to issue a certificate upon which the money was to be raised through some bank. According to the record, one of the parties stated that he (said party) had made "a deal" to

The [illegible]

August 16, [illegible]

the [illegible]

[illegible]

the [illegible]

[illegible]

not [illegible]

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"It was [illegible]

court, [illegible]

with the [illegible]

SIE, [illegible]

It was [illegible] intended in the [illegible] to leave [illegible] was to be relaxed through some [illegible]. According to [illegible], one of the parties stated that he (said party) had made "a deal" to

obtain the money from a bank on the security of the Master's certificate of sale which the master was to issue, which was satisfactory to the master, etc. No application should have been made to approve such uncertain transactions, nor should it have been approved by the court. The owners of the equity who are entitled to redeem the property have certain rights and obligations under the statute of redemption as to the amount and also as to the time of such redemption. Ill. Rev. Stats. 1937, Chap. 33, Par. 4, Sec. 48; Bruschke v. Wright, 186 Ill. 183. In the instant case the objectors who claim they were the owners of the equity having the right of redemption, were entitled to be heard and the court was in error in overruling the objections and dismissing the petition and answers without permitting such hearing.

For the reasons herein given the order of the Superior Court is reversed and the cause is remanded with directions to set aside the orders approving the master's reports, and it is also ordered and directed that the so-called sale be set aside and a new sale ordered in compliance with the decree.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL AND BURKE, JJ. CONCUR.

40266

DRAPER & KRAMER, INCORPORATED,
Plaintiff - Appellant,
v.
JOSEPH BARNETT and ESSIE BARNETT,
Defendants - Appellees.

) APPEAL FROM
) CIRCUIT COURT
) COOK COUNTY.

MR. JUSTICE DUNNE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants for real estate broker's commission for services rendered which (plaintiff charges) resulted in the sale of the improved property at the southeast corner of Devon and Western Avenues, Chicago, to the Marshall Field Estate for $310,000.00. Upon a trial before a jury, a verdict was returned in favor of plaintiff for the amount of the claimed commission in the sum of $9,800.00. Thereafter, the court sustained defendants' motion for a directed verdict, made at the close of all the evidence, upon which ruling had been reserved, and entered a judgment notwithstanding the verdict, to reverse which this appeal is prosecuted.

In 1927 the property at the southeast corner of Devon and Western Avenue, Chicago, was owned by the defendant Joseph Barnett and the mother of the defendant, Essie Barnett. In that year a three story brick building with stores on the first floor, offices and apartments on the second floor and apartments on the third floor was erected on the premises. At that time plaintiff, through its secretary, Maurice A. Pollak, for the purpose of financing the erection of the building, negotiated a $210,000.00 bond issue, which was sold to the Chicago Title & Trust Company. In 1932 when the bond issue came due, Pollak arranged for an extension of the unpaid balance of $190,000.00. One of the terms of the extension of the loan provided that Barnett was to operate and manage the property, and that he was to pay the expenses and turn over the net rents each month to the plaintiff for distribution to the bondholders.

Each month, commencing with 1933, Barnett brought to the office of plaintiff a statement in duplicate showing receipts and disbursements, together with a check for the net income, and each month plaintiff remitted the net income, together with a copy of the statement, to the Chicago Title & Trust Company. Such had been the practice for three years prior to August, 1935. Prior to August, 1935, Robert H. Pease, a real estate broker employed by plaintiff, approached Ward Farnsworth, head of the real estate department of the Marshall Field Estate, in connection with a piece of property on the south side of Chicago. Mr. Farnsworth referred him to Henry F. Darre, an employee of the Marshall Field Estate whose office was located at 4010 West Madison Street, Chicago. Mr. Farnsworth, located in the main downtown office, was Darre's superior. The latter was not authorized to purchase property. He had to do with the management of property. Pease, together with Darre, made an investigation of the south side property. That deal fell through because the owner raised the price that he was asking. In all the transactions relating to the property, Joseph Barnett acted for himself and for his niece, Essie Barnett, who is also a defendant. She did not testify. When we speak of Joseph Barnett, we will call him defendant. About August 5, 1935, while Barnett was on his monthly visit to plaintiff's office, Pollak suggested that the Marshall Field Estate might be interested in buying the Barnett property.

Maurice A. Pollak, the first witness for plaintiff, testified that defendant returned a few days later and told him that he would sell if he got the right price, and inquired of the witness what the property would bring. Witness stated that the Marshall Field Estate was buying considerable section line corners in Chicago; that defendant told him he read in the papers about their buying property; that the witness asked defendant if he had ever submitted the property to anyone; that defendant replied in the negative;

that defendant said he would talk the matter over with his niece; that defendant came back a few days later and said he was willing to consider selling the property; that the witness told defendant he would go to the Marshall Field estate to ascertain if they were interested; that Robert H. Pease, a real estate broker employed by plaintiff, made an appointment with Mr. Darre; that the following morning witness and Mr. Pease called on Mr. Darre at his west side office; that they told Darre they were trying to interest the Field Estate in purchasing a piece of property at the southeast corner of Devon and Western Avenue; that Darre called up his downtown office and that after the telephone conversation had been concluded he told them that the Field Estate knew of the corner, and that the estate would be interested in having the property submitted; that the estate was interested in the corner, had looked at it but had not been able to get any information regarding it; that he asked plaintiff to submit plans, monthly operating statements and a resume of the statements; that they then left the Darre office; that they talked to defendant at their office about the 11th or 12th of August; that he then informed defendant that he had talked with Darre, that the estate was interested in purchasing the property and wanted information submitted; that he discussed the price with defendant, and stated that from his experience he thought the estate would be interested at somewhere between $300,000.00 and $400,000.00, and that it would be best to ask $400,000.00 "because naturally we wanted to get as much as possible for the property"; that he then took out an exclusive sales contract form and filled in the figure $400,000.00 and the figure of 30 days' time; that he gave it to defendant, who said he would take it home and sign it and also have his niece sign it; that the witness and Pease then started to work up the statements and plans to the best shape possible; that plaintiff had a set of blueprints of the building; that the figures were

that defendant [illegible];
that defendant [illegible]
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his niece sign it; that the witness and [illegible] started to work
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tiff had a set of blueprints of the building; that the figures were

obtained from copies of the monthly statements which defendant brought to the office; that on August 19, 1935, defendant handed the signed sales contract to witness. The contract, dated August 19, 1935, signed by defendants and addressed to plaintiff, reads as follows:

> "In consideration of the sum of One Dollar, receipt acknowledged, I hereby give you exclusive sale of my property, described as South East Corner of Devon and Western Aves., for a period of 30 days from this date, at a price of $400,000 subject to an existing incumbrance of $190,000 bearing interest at the rate of six per cent, due . . . . or any less sum which I shall agree to accept, and to pay you the usual commission as established by the Chicago Real Estate Board, on such sale price, you to have the privilege of purchasing this property during said period, if you so desire. Title to be taken in your name or in the name of anyone you may designate. I agree to furnish at my expense, if I enter into a contract, Chicago Title and Trust Company Guarantee Policy, showing a merchantable title in me and brought down to date of sale. All taxes, special assessments and general expenses on property to be prorated to date of delivery of deed.
>
> In consideration of having given you this exclusive contract, it is understood that you are to advertise and show property without expense.
>
> "Joseph Garnett
> "Essie Garnett"

Pollak testified further that plaintiff made up monthly statements covering the period from August 1, 1934, to July 31, 1935, also a letter summarizing the operating figures and commenting on occupancy, taxes and insurance; that Mr. Pease took the statements, the letter and the plans to Mr. Darre on August 20th or 21st; that later in the month of August or the first part of September, the original sales contract was taken by Pease to Mr. Darre's office; that it was returned by Darre after the latter had made a photostatic copy of it; that the witness had not seen the original summarizing letter since it was delivered to Darre; that the statements made by typewriter in columnar form showed receipts from the tenants and disbursements, with a recapitulation showing the net balance on hand at the end of each month; that after the statements and other data had been transferred, defendant came to the office every few days for about 60 days; that the defendant asked him if he thought he would get the amount asked; that the witness stated

that he had taken out all the non-recurring items of expense and certain things that the estate would not have to have if they managed the property themselves; that he told defendant that he did not know if the estate would pay $400,000.00 for the building; that he did not tell defendant what he thought he would have to take for it. Witness further testified that Pease reported to him and that he reported to defendant as to the developments; that the last time witness talked to defendant was a day or two after September 15th; that he then told him that they had no word from Darre as to whether the estate would be interested; that Darre had told Pease that the men downtown were going over the plans and the figures submitted and that he had no offers as yet from the downtown office; that a few days later when the 30 days limitation in the "exclusive" contract had expired, witness mentioned that fact to defendant, who said, "Go on, work on it. That doesn't make any difference"; that he continued working on it and saw defendant a few days after that; that about October 20, 1935, the plans, statements and a photostatic copy of the contract were found on the desk of Mr. Pease in plaintiff's office; that the day the plans and other papers were found in the office, witness telephoned Barnett that the plans had been returned; that Barnett told him the matter was being handled by his attorney, Mr. Sidney L. Robin; that witness had talked with Mr. Robin about August 25th, at which time Mr. Robin told him that he understood plaintiff was working on a deal with defendant, and that he, Robin, told defendant that he, defendant, should let plaintiff work on the deal because plaintiff was familiar with the property, and that "if anybody makes a sale of this property, Draper and Kramer should make the sale"; that the witness did not call on Mr. Robin immediately after the telephone conversation with defendant; that at the request of Mr. Robin witness called at Robin's office around November, 1935. At the conference were a broker

by the name of Morris Edelberg, Mr. Robin, the defendant and the witness; that witness there stated that he, plaintiff, had the exclusive sales contract from defendant; that defendant knew he was submitting the property to the Field Estate and that the Field Estate had returned their offer with the statement that they had a deal with another broker; that he knew plaintiff was the first to submit the property to the Field Estate in any shape or form and that plaintiff expected to make this deal; that Edelberg stated, "There is only one person that can sell this property to the Field Estate, and that is myself"; that Barnett stated to Edelberg, "I told you when you came to see me that I had given an exclusive on this property to Draper and Kramer and that they were working on it;" that Edelberg said, "We can pay you $1,000 out of this commission here if you can negotiate with the holder of the mortgage to get them to accept a discount on the mortgage;" that witness declined so to do; that he had not met Edelberg before then; that defendant thereafter continued to bring in the statements and told witness that "they were still working on the deal"; that witness told defendant that plaintiff expected a commission on the deal; that Mr. Robin telephoned him one day and asked if he would send certain details to him so that he could advise defendant what he would realize from a sale in the sum of $300,000.00, which was the offer defendant had at that time; that in the presence of defendant, Robin said: "There was an offer made but it is not as much as Mr. Barnett wants. Now, the thing for us to do is for us to work out something where we can get Mr. Barnett a sufficient amount for this property;" that Robin did not then say what the figure was; that subsequently "when Mr. Barnett came in, he told me the offer had been raised to $310,000.00. At that time he told me he could not make up his mind whether he wanted to sell or not." On cross-examination, he stated

that the conversation in Robin's office occurred toward the end of October, or the early part of November, after the "exclusive" contract had expired and after the papers that had been sent to Mr. Darre had been returned; that after the return of the papers plaintiff could not do any more with the estate because "they said they had a deal with someone else. That was our only prospect for the sale of the property." On redirect examination he stated that after returning to his office from Mr. Robin's office, he received a telephone call from Barnsworth in which the latter accused plaintiff of "trying to chisel in on this deal;" that he replied that he was not "trying to chisel in", that he had submitted the property to Mr. Darre, the estate's representative; that Barnsworth declared that Darre did not have anything to do with the purchase of the estate's properties; that Barnsworth said he did not know any one in plaintiff's office, and that he Barnsworth, denied knowing Mr. Pease; that Barnsworth said, "I never heard of Mr. Pease, never saw any one of you. You get out of this deal or I won't buy that property. You stay away from this thing because if we are going to buy this property we won't buy it from you. There are other brokers, and if anybody gets half of that commission I am going to get half of the commission."

Robert H. Pease, a witness for plaintiff, corroborated the testimony of the previous witness. He also stated that he delivered the documents heretofore mentioned to Mr. Darre; that he talked to the latter at least once a week for approximately 60 days, and that the tone of the conversation varied from time to time; that in one case they wanted more information regarding the Walgreen lease; [The Walgreen drug store lease was the most important lease covering the corner store.] Witness said that in another conversation with Darre, the latter wanted to know when the building was built and

who built it, and in another, information regarding rentals in the neighborhood; that on one occasion Darre called the witness on the telephone and stated that "the men downtown did not believe we had an exclusive sales contract on the property and he would like to have me bring it out to him so he could get it photostated;" that he did so and Darre returned the original to him later. Witness stated that when he learned of the conversation between Farnsworth and Pollak, he called on the former, who admitted that he plaintiff had met witness before; that Farnsworth wanted to know if plaintiff would be interested in receiving $2,500.00 as its share of the commission; that he informed Farnsworth that he did not have authority to pass on the matter; that after talking with his superiors, witness telephoned Farnsworth some time later that the offer would not be accepted; that after the return of the plans, statements and photostatic copy of the exclusive contract, he called Darre and said, "I could not understand how the data and plans were returned to us because no offer had been made to purchase and they must still be interested in it. He said he was sorry to tell me that the boys downtown could not deal with Draper and Kramer but had to consider another broker's office in the picture. I told him that I could not understand how they kept the information for 60 days and that I had been in contact with him at least once a week and thought I would have some intimation before this if there were someone else in the picture; that they certainly would have known it, and I did not believe that they would have kept it for 60 days and then tell us we were out." On cross-examination, the witness answered, stating, "I did not ever at any time receive an offer from the Marshall Field Estate or anyone else to purchase the Barnett property. I do not know of any such offer having been given to Draper and Kramer."

Wendell Philo Gilbert, a witness for plaintiff, testified that he is a practicing attorney, associated with the firm of Wilson & McIlvaine; that the latter firm represented the Marshall Field

Estate in connection with the south side property; that in behalf of the estate, he dealt with Pease in connection with the south side deal; that Wilson & McIlvaine were the general counsel for the trustees of the estate; that the law firm of Gardner, Carton & Douglas and other firms sometimes acted for the Field Estate in the purchase of property; that quite generally the property purchased by the outside firms was in the name of a nominee.

Ward Farnsworth, a witness for plaintiff, testified that he authorized Darre to accompany Pease for the purpose of looking over the south side corner. He recollected that some time in the Fall of 1935 Pease talked to him in his office after he had a telephone conversation with Pollak; that he heard the testimony of Pease and denied he had any conversation with Pease about the purchase of the property at Devon and Western Avenue. Witness stated that Darre submitted through plaintiff a set of plans on the real estate and an exclusive sales contract; that the plans, specifications and sales contract were in the hands of James Douglas of the firm of Gardner, Carton & Douglas, who represented the estate; that witness acted as a means by which such documents were directed to Mr. Douglas, who was acting for the Field Estate. On cross-examination witness stated that in 1935 he was head of the department of the estate which had to do with the handling of the purchase of real estate; that the practice was for the properties to be first submitted to the attorneys for the estate, and that it was witness's duty to pass on the desirability and to negotiate for the purchase after the trustees had authorized him so to do; that the Garnett property, which in 1936 was purchased by the estate, was first submitted to Gardner, Carton & Douglas on April 2, 1935, by Stanley C. Chadwick and Morris Edelberg; that the information submitted by Chadwick and Edelberg to the attorneys, and which in turn was submitted to the witness, "was too meager for us to form an opinion as to what the property might comprise

in value;" that the contents of defendants' exhibit 1 were communicated to the witness by Gardner, Carton & Douglas. Defendants' exhibit 1, which was later received in evidence as part of defendants' case, is a letter dated June 25, 1935, on the stationery of Rosenthal, Hamill & Normser, addressed to Messrs. Gardner, Carton & Douglas, the attorneys for the estate, captioned, "Ne Southeast corner Devon and Western Avenues Property", setting forth a statement of income from May 1, 1933, to and including April 30, 1935, cash expenditures for operating expenses, taxes, net income etc. It also sets forth the same items for the year from May 1, 1934, to and including April 30, 1935, the rent roll for the current year, and an estimate of present annual rent roll with deduction for space used by the owner and unrented space, together with reference to possible savings from reduction in insurance, and a breakdown of rental allocated to stores, offices and apartments. The exhibit further states that the property is not generally offered for sale, and that it is the owner's attitude that the particular corner will rise in value. Witness further stated that he would not be entirely familiar with the negotiations carried on between the attorneys, the seller and the brokers; that "the deal did not come up as a serious consideration for purchase in our office until some time later in the summer of 1935;" that at one time he was informed that plaintiff claimed to have the exclusive agency contract, and that Gardner, Carton & Douglas so informed him; that he saw a copy of the contract two weeks before he testified, and that he did not know whether an offer was made on the property during the time of the exclusive contract, that it seemed to him that "the possible purchase of the property wasn't imminent in the fall of 1935 because of the fact that the sale was not consummated until the following June;" that on November 7, 1935, the estate authorized the brokers to purchase the property at $300,000.00; that Walter Cummings of the Continental Bank,

George Richardson and the witness ultimately pass on all purchases by the estate, and that no property was purchased that the witness did not pass on; that if plaintiff contributed to the consummation of the sale to the estate "it wasn't through anything they contributed to the estate of Marshall Field or Gardner, Carton & Douglas." Witness further stated that Carre was manager of about 50 buildings for the estate, and that he had nothing to do with the purchase of property, and had no authority to negotiate; that on November 7, 1935, Gardner, Carton & Douglas wrote their brokers authorizing the purchase of the property for $300,000.00; that there was conversation about a $335,000.00 counter-offer, which was rejected by the estate; that the next indication of negotiations came on January 28, 1936, and that the property was finally purchased in June, 1936, for $310,000.00. In answer to the question as to what brokers the estate dealt with, he answered: "A strict answer to the question would be that the Marshall Field Estate did not deal with any brokers; that Gardner, Carton & Douglas, representing the Marshall Field estate, dealt with one Stanley C. Chadwick and one Morris Edelberg." Witness further stated that Chadwick and Edelberg were the same brokers who submitted the property to Gardner, Carton & Douglas in April, 1935, and denied the testimony of Pease that he offered plaintiff $2,500.00 as its commission. On redirect examination witness stated that Chadwick was a licensed real estate broker; that the estate had acquired some twelve millions dollars worth of property from many brokers; that Chadwick very ably represented the estate and probably sold the estate more real estate than any individual broker; that to his knowledge, Chadwick was not first sought out by Barnett, that Chadwick came in contact with Barnett because he was active in hunting for property for the Field estate, and that as far as the witness knew, Chadwick never personally met Barnett; that the correspondence with Gardner, Carton & Douglas

indicated that Chadwick had difficulty in getting in touch with Barnett. Witness stated that neither he nor any one of the estate ever directed or authorized Adelberg to say that the estate would only buy the Barnett property through him.

Henry F. Barre, called on behalf of plaintiff, testified that he and Pease went out to look over the south side property; that he sent all the papers delivered to him by plaintiff's representative to Gardner, Carton & Douglas. On cross-examination, he stated that while working on the south side property Pease mentioned another piece of property to him that he would like to submit; that the witness told him he had no authority to purchase property, but would as a favor to him, see that the information got to the proper parties; that accordingly he forwarded the information (on the Devon and Eastern property) supplied to him by plaintiff's representative, to Gardner, Carton & Douglas; that a member of the latter firm told him that the property had already been submitted and that he passed that information along to Pease; that the information that the property had already been submitted, did not terminate witness's relationship with Pease "although I thought it would"; that Pease brought Pollak in and told witness that plaintiff had an exclusive sales contract; that he asked that it be sent in and that he would be glad to forward it to Gardner, Carton & Douglas, which was done; that subsequently he returned it to Pease; that there were many calls, but that witness did not recall that Pease had called on him every week for 60 days. On redirect examination, he stated that his employment was limited to the management of properties; that in the inspection of properties under instructions of purchase, he was merely asked to go out and look them over and get an opinion on them; that Farnsworth did not as a general rule give him authority to inspect submitted properties and to report on them, and that the south side case was an exception.

Pollak being recalled by plaintiff, identified plaintiff's exhibit 8, being a letter dated October 31, 1935, from plaintiff to Rosenthal, Hamill & Wormser, attorneys for defendants, telling about the tax situation and the interest account. On cross-examination, he stated that he sent the letter in response to a request from Mr. Robin, who stated that he had to advise defendant so that he could tell him at what price the property might be sold and therefore had to know the situation on the taxes and the mortgage in order to be able to properly advise him as to how much he would realize from the sale; that it was natural for Robin to ask the witness for the information because he knew more about the property than any one else, and had all the available information.

Joseph Barnett testified that in 1935 he and his niece, Essie Barnett, owned the premises; that in March or April, 1935, a broker named Frassas approached him about the sale of the property; that Edelberg talked to him in connection with Frassas before August 1, 1935; that August 19, 1935, was the first time he discussed the proposed sale with Pollak, and that the witness told Pollak he had an offer of $300,000.00 from the Field Estate; that Pollak advised him he would be foolish to sell at that price, stating that he could get $400,000.00 for it; that the witness told him that if he could get $400,000.00 "that was fine", and that he signed the exclusive contract and procured the signature of his niece; that at the time he signed it he knew he had an offer of $300,000.00 for the property; that during the period covered by the contract he had no conversation with any other brokers regarding the property, and that after the expiration of the contract he had negotiations with the same brokers as already named, namely, Frassas and Edelberg; that he was present in the office of Attorney Robin in October or November, 1935, at the same time that Edelberg and Pollak were there; that it was suggested that Pollak go to the Chicago Title & Trust Company, the

holders of the mortgage, for the purpose of getting a discount on the mortgage, and that Edelberg said he would give Pollak $1,000.00 for that service; that Pollak asked $2000.00, and that before he left, Pollak said he expected a commission if the property was sold to the Field Estate; that in June, 1936, Barnett sold the property to the Field estate for $10,000.00; that prior to the conferences in Robin's office, witness had never been told by Pollak that he had submitted his property to the Field estate, and he did not say that day that he had done so; that he talked to Edelberg in June, 1936, in connection with the sale of the property; that Edelberg represented him in the transaction, and that he saw Edelberg with respect to the sale of the property from December, 1935, to June, 1936, and that he talked to Edelberg after the expiration of the 30 day period.

Morris Edelberg, called as a witness for defendant, testified that he had been a real estate broker for 15 years; that he had known defendant 15 or 20 years; that the first conversation concerning the sale of the property was in January, 1935, at the property and that defendant and his son were present; that he declined to give any information, and that witness told him he would be back at some future date and to think the matter over; that he returned in February, 1935, and that he again told him he was not ready to give any statement on the property as he had not made up his mind whether he wanted to sell; that witness informed him he had someone who was interested and that he would like to get some definite information on the property; that he visited him every month or so until June, and that he then told defendant that in order to satisfy him that he had some one in mind as a purchaser, he mentioned that the Field Estate was interested, and that defendant told him that a broker named Prassas had approached him on the sale of the property to the same people; that witness told him he would check up with the

real estate agent of the estate. Witness further stated that the agent was Stanley C. Chadwick; that he saw Chadwick in January, 1935, and told him he was trying to get a statement on the property, and that Chadwick told him to get it; that Chadwick told him that he himself had written a letter to the owner, or his attorneys, as to the income on the property and other particulars, as he could not get any information from Prassas; that if witness could get the information, he would recognize him as the broker in the deal; that he went back to defendant and told him not worry about another agent, that "we can get Mr. Prassas to withdraw from the deal without commission"; that defendant said he would have his attorney, Mr. Robin, get in touch with him, and that the witness could negotiate with Mr. Robin from then on; that in July witness got a telephone call from Robin, whom he had not known before; that Robin told him Barnett had discussed with him the sale of the property and an appointment was arranged; that Robin gave him a summary of the property, the lump sum of income, expense, taxes, etc., but not itemized, and told him if he could sell the property on the basis of about 5% on capitalization on net income, the deal could probably be made; that he gave the information to Chadwick, who was acting for the estate; that in the latter part of July he received a call from Chadwick, who told him the estate was ready to make an offer, and that Chadwick told him the price would be $275,000.00, all cash; that the witness stated the proposition was ridiculous, and that Chadwick then stated that the estate would go as high as $300,000.00, but not to make that his first offer; that he carried the information to Robin, and that Robin told him the estate would have to pay at least $335,000.00; that he went back to Chadwick and so informed him; that Chadwick said that they did not have a complete statement, that if they had all the information they needed, they could probably show where the property was worth more money; that about the middle of

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that Chadwick said that they did not have [illegible] that

if they had all the information they needed, they [illegible] probably show

where the property was worth more money; that about the middle of

August, 1935, witness called up Robin and was informed that Barnett had given an "exclusive" on the property to plaintiff; that he called defendant to verify the statement and that defendant told him that he had given an exclusive for 30 days, and that the price he was going to get was somewhere around $400,000.00; that at the witness's request, defendant told him that if the deal did not go through, to call him up at the expiration of 30 days; that defendant told him that while the time limit had expired, he would give plaintiff a couple of extra weeks; that after the expiration of two weeks from the expiration of the time limit, an appointment was made at the office of Mr. Robin; that at the meeting, attended by Pollak, Robin gave a lengthy summary of what had gone on before, stating that a proposition had been made by the Field estate for $300,000.00, all cash, that $335,000.00 was the price asked and that it did not look as if a deal could be made, that if the facts were explained to the bondholders it might be possible to scale down the amount due on the bonds to adjust the difference, and it was suggested that Pollak was a good person to make the adjustment; that Pollak stated that he offered the property to the Fields himself; that Robin said there would be only one commission paid, and that the broker "that is entitled to the commission is going to get it;" that witness told Pollak he had worked on the property since January and that he did not have any knowledge that plaintiff was mentioned by any one; that he checked up with Chadwick, and that Chadwick said that no one knew anything about Pollak and that Pollak would not be recognized as a broker; that Chadwick told him there was a conversation between Farnsworth and Pollak wherein the latter claimed he was entitled to a commission if a deal was made, and that Farnsworth, because of the difficulty, said they did not want the property at all; that witness wrote a letter stating that there would be no further negotiations

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wrote a letter stating that there would be no [illegible] [illegible]

on the property, which was in October or November; that after the matter had rested for a week or two, he told Chadwick that because of the work that had been put into the deal he would like to have the matter taken up again; that Chadwick responded that he would take the matter up at the next meeting; that in November Chadwick told him the estate would pay $310,000.00 for the property provided the engineers inspected it and found it to be in first class condition, and that witness obtained authorization for the engineers to inspect the building; that they did so and reported that the building was not in first class condition and that the repairs would cost $12,000.00, that Barnett would not agree to pay the cost of the repairs and that hence a deal could not be made, as Barnett would not stand one dollar for repairs; that witness requested the agent of the estate to again send out the engineers to the property, and that the witness met the engineers and went over the property with them; that witness showed the engineers that repairs had been made a short time previous, and that their findings as to repairs were not well founded. Witness identified exhibit 3, being a letter dated December 30, 1935, on his stationery as a broker, addressed to Rosenthal, Hamill & Cormser and signed by himself. In the letter he offered $310,000.00, all cash. Witness stated that the estate wanted to know what additional income might be derived through a percentage clause in the Walgreen lease, if they agreed to pay $310,000.00; that he obtained the information from defendant and informed the estate that on account of the increased business of 1936, the estate could reasonably expect an increase of $1,000.00 in the rent received from the Walgreen drug store; that thereupon the estate agreed to pay $310,000.00, and that the matter was then turned over to the attorneys in order to close the deal. On cross-examination, witness stated that Chadwick told him that notwithstanding that he was the representative of the Field Estate in

on the [illegible]

matter [illegible]

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On cross-examination, witness stated in substance that not-

withstanding that he was the representative of the Tiffany estate in

looking for properties to be acquired, that if he (Chadwick) got in on a deal with the witness, that the witness would be one of the brokers with Chadwick and that the commission would be divided; that Chadwick was interested in having a deal made so that he could get part of the commission; that in December, 1935, Robin, on behalf of the owners, accepted the offer of $310,000.00; that it took from December, 1935, until April, 1936, before a contract was signed, and from April, 1936, until June, 1936, before a conveyance was made; that when the offer of $310,000.00 was made, he informed defendant that that was the highest amount that he could get, and that it would be useless to negotiate further, and that Farnsworth told the witness that the yield on $310,000.00 was about 5-1/2% return; that the witness unsuccessfully attempted to discount the mortgage on the property.

James H. Douglas, a witness for defendant, testified that he was a member of the law firm of Gardner, Carton & Douglas; that in 1935 the firm represented the Field Estate in connection with the acquisition of properties in Chicago. He identified a letter dated April 8, 1935, from Stanley C. Chadwick, Inc., addressed to James Douglas of Gardner, Carton & Douglas, received in evidence as exhibit 4. The letter stated that a few days previous they had given information on the property at the southeast corner of Devon and Western Avenue; that the owners were agreeable to selling but their lawyer was reticent about giving out detailed information, as he believed it was another real estate firm trying to list the property; that Chadwick would appreciate it if Douglas would drop a few lines to Sidney L. Robin, stating that Douglas's firm had a client who was interested in purchasing, and asking for a detailed statement of the income and operating expense. The letter recited that Prassas was associated with Chadwick in trying to work out a deal. He is the one who contacted Barnett. The letter further stated that the owner

had quoted a price and given the gross rental and approximate operating expenses but that Chadwick was anxious to get the exact figures allocated to the various spaces in the building and the exact operating expenses; that on May 29, 1935, Gardner, Carton & Douglas wrote a letter to Robin requesting the information and stating that they were advised by Frassas that the owner was reluctant to give information, and that if their client made an offer on the property it would be a cash offer. Witness stated that the client referred to in the letter was the Marshall Field Estate; that in reply to the letter, he received a letter dated June 25, 1935, admitted in evidence as exhibit 1, on the stationery of Rosenthal, Hamill & Wormser, giving the information requested. That is the letter which has heretofore been mentioned in the testimony of Mr. Farnsworth, a witness for plaintiff. It will be recalled that on cross-examination Mr. Farnsworth said that the contents of defendant's exhibit 1 were communicated to him by Gardner, Carton & Douglas. Mr. Douglas testified further that he submitted the information to Mr. Farnsworth, representing the Field Estate; that he talked to the latter after he had given him the information and then talked with Robin and indicated that the estate would pay $300,000.00, and might go as high as $320,000.00; that his memorandum indicated that on August 14, 1935, he talked to Robin and was advised by him that he had submitted further figures. Witness also identified defendant's exhibit 6, being a letter from Stanley C. Chadwick, dated August 2, 1935, addressed to James H. Douglas. The letter mentioned the property and stated "this finally shaped around where the only real estate man that Mr. Barnett is willing to give this information to was Morris Edelberg, 188 West Randolph Street. Consequently I will have to work with Mr. Edelberg as associate broker if your clients are

interested in the property." Witness stated that his firm represented the estate in the purchase of the property from April, 1935, until the deed was delivered in June, 1936; that he did not know that the firm of Draper and Kramer had anything to do with the sale of the property, and that he did not know that it had a written authorization to sell at one period during the negotiations. On cross-examination, he stated that one of the reasons why negotiations were carried on through his office was to avoid the likelihood of persons knowing that the Field Estate was interested in the property; that it was his function to deal with brokers to the extent of being the link between the broker and the Field Estate. Chadwick, called by plaintiff in rebuttal, identified a letter from Rosenthal, Hamill & Wormser, attorneys for defendants, to himself. The letter was received in evidence as plaintiffs' exhibit 9. It contained an offer to sell the property for $335,000.00, the next to the last paragraph reading as follows: "In your letter you mention broker's commissions. We wish again, at this time, to point out that our clients will pay only one commission and then only if a transaction acceptable to them is ~~finally~~ fully consummated. You were fully informed of the participation of Mr. Prassas, Mr. Edelberg, and Draper and Kramer, Inc., in the negotiations up to this time. Effectual waivers and releases must be obtained from all of these brokers in connection with any payment of commissions." The witness stated that he was president of Stanley C. Chadwick, Inc., and that he knew Farnsworth for 5 years; that he met Mary Farnsworth, wife of Ward Farnsworth, and that she was not interested in Stanley C. Chadwick, Inc., that she was not an officer therein and that she was not vice president at any time. Mr. Pollak recalled in rebuttal by plaintiff, denied that he said that he asked $2000.00 at the time a $1000.00 offer was made for discounting the bonds; that he would not be a party to

such a transaction when he knew that the owner was obtaining far more than the amount of the mortgage. Chadwick resumed the stand as a witness for plaintiff, and on being shown a photostatic copy of a dissolution statement filed in the Recorder's Office, said he recognized his signature thereon. He stated that he observed on the document that Mary Farnsworth was vice president of Stanley C. Chadwick, Inc. He stated that he did not know that she was vice-president, although he was the president. The court received in evidence a statement of intent to dissolve, showing that Mary Farnsworth was vice president of Stanley C. Chadwick, Inc. There was also received in evidence as defendant's exhibit 7 a letter from Stanley C. Chadwick, dated November 7, 1935, addressed to Sidney L. Robin, offering the property for $300,000.00.

The burden was on the plaintiff to establish by a preponderance of the evidence that it was the procuring or efficient cause of the sale. The parties have cited numerous cases where the rule was applied. A reading of the cases gives us an excellent view of the manner in which the courts apply the law to the factual situations. The cases show that the courts do not tolerate a broker being cheated out of an honestly earned commission, no matter what device or contrivance may be set up to effectuate that purpose. We are called upon to determine whether the action of the trial court in saying that as a matter of law, there was no evidence to sustain the verdict, was right. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such

motion is whether there is any evidence fairly tending to prove the plaintiff's complaint. If the condition of the evidence at the close of plaintiff's case does not justify an instruction for a verdict in favor of defendant, no evidence which defendant may introduce will justify such instruction except the uncontradicted evidence of facts consistent with every fact which the evidence of the plaintiff tends to prove but showing affirmatively a complete defense. (Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387; Illinois Tuberculosis Assn. v. Spring Marine Bank, 282 Ill. App. 14; Shannon v. Nightingale, 321 Ill. 168.) In the instant case, the court held, as a matter of law, that there was no evidence for the jury to weigh. Hence it has been necessary for us to set out the evidence in greater detail than would ordinarily be done. Keeping before us the principles of law governing the cases, we have carefully considered and analyzed the evidence. It is clear that the defendants desired to sell their property. There is nothing in the record to indicate that they had any wish or desire to favor one broker over another. They wished to secure the highest possible price for the property. The only prospective purchaser in the market was the Marshall Field Estate. It was a matter of common knowledge that the Field Estate was at that time purchasing desirable improved section line corners in Chicago. The first approach by plaintiff's agents to Mr. Barnett, concerning the sale of the property, was about August 5, 1935. The exclusive sales contract apparently was signed and is dated August 19, 1935. The testimony of Barnett and Pollak is conflicting on the proposition as to whether Barnett had previously negotiated with the Field Estate. Plaintiff's witness, Ward Farnsworth, however, testified on cross-examination that the property was first submitted to Gardner, Carton & Douglas, attorneys for the Field Estate, on April 2, 1935, by Chadwick and Edelberg, and that the contents of a letter from

Rosenthal, Hamill & Normser, dated June 6, 1935, giving a statement of income and operating expenses, taxes, net income, the rent roll, an estimate of the annual rent roll with deduction for space used by the owner and unrented space, together with possible savings from reduction in insurance and a breakdown of rental allocated to stores, offices and apartments, were communicated to him by Gardner, Carton & Douglas. The evidence also shows that the statements consisting of copies of itemized monthly statements, a letter summarizing the operating figures and commenting on occupancy, taxes and insurance, and the plans of the building, were delivered by plaintiff to Mr. Darre, who was an employee of the Field Estate. Darre, by direction of his superior, forwarded the documents to the law firm of Gardner, Carton & Douglas. We find that the delivery of the papers to that law firm which represented the Field Estate, was equivalent to delivering the same to the Field Estate.

Plaintiff insists that the proposition as to whether it was the procuring cause was a question of fact which was properly passed on by the jury, and cites cases to support its contention. The question as to who is the procuring cause is not always a question of fact for the jury. The property was submitted to the Field Estate prior to the time that plaintiff became interested in attempting to sell it. Plaintiff was given a contract which gave him the exclusive right to sell within 30 days. It was not able to effecuate a deal within that period. There is a conflict in the testimony as to whether it was granted an extension. We, of course, accept the testimony in favor of the plaintiff on that proposition. There were various offers and counter-offers as to the amount of the purchase price. The maximum amount which plaintiff decided to ask was $400,000.00. It was anticipated that it would be necessary to lower the offer during the negotiations. The estate was willing to pay $300,000.00. Defendants offered to sell for $335,000.00,

and eventually the estate offered $310,000.00, which was accepted. On or about October 30, 1935, the monthly statements, plans and photostatic copy of the contract were returned to plaintiff. Plaintiff then became aware of the fact that it was not being considered as a broker in the deal that was being discussed. At that time the principals had not reached any agreement. The offer of $310,000.00 was conveyed by Edelberg to the attorneys for the defendants on December 30, 1935, and a few days later Edelberg spoke to one of the attorneys for the defendants, who informed him that his clients accepted the proposition. In the meantime, Edelberg had to convince the engineers for the Field Estate that no repairs would be necessary. The engineers had previously estimated that the repairs would cost $13,000.00. If the engineers insisted on the repairs being made, the deal could not be carried out as Barnett would not contribute anything for repairs. The contract was not actually signed until April, 1936, and the deed was not delivered until June, 1936. If, through securing and forwarding the information delivered through Darre, plaintiff was the procuring cause of the sale, plaintiff could recover, even though other brokers intervened. The evidence of the plaintiff related entirely to the period between August and October, 1935. The negotiations continued until the end of the year, and it was not until the $310,000.00 offer was accepted and the two inspections by the engineers for the estate, that the deal was agreed on.

Plaintiff infers that Farnsworth was guilty of unethical practices. The evidence tends to show that Edelberg was directed to Chadwick by Farnsworth. There is testimony that no deal could be made involving the Field Estate unless Chadwick and Edelberg were

recognized as brokers. The evidence also shows that although Chadwick and Edelberg would receive their commission from the sellers, nevertheless, they were also considered as acting for the Field Estate. Evidence was also presented which indicated that the wife of Farnsworth was an officer in the Chadwick corporation, and it is inferred that Farnsworth had more than a friendly interest in insisting that any deal be negotiated with a recognition of Chadwick as the agent. But we are unable to perceive how the conduct of Farnsworth and Chadwick can militate against the defendants. If, as a matter of fact, no deal could be effected without Chadwick and Edelberg being recognized as the brokers, then it is difficult to understand how the plaintiff could be the procuring cause. From a thorough and careful review of the evidence, we are satisfied that the court was right in deciding as a matter of law that plaintiff was not the procuring cause of the sale, and that there was no question of fact for the jury to consider.

For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40761

RUSSELL F. LOCKE,

Petitioner - Appellant,

v.

HYMAN FEINBERG and ALMER FISHER,

Respondents - Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

301 I.A. 614

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In 1932 defendant, Hyman Feinberg, became a client of the Chicago law firm of Ashcraft & Ashcraft. About September, 1936, Feinberg and his son-in-law, Almer Fisher, became interested in the purchase of the real estate at 3713-15-17 West Roosevelt Road, Chicago, and consulted Russell F. Locke, a member of the law firm, in connection with the purchase of the property. From then on various services were performed by the law firm, for which a bill dated September 30, 1937, was rendered to defendants. The bill charged defendants $1,630.00 for services rendered and $210.65 for expenditures made in their behalf. The members of the law firm of Ashcraft & Ashcraft assigned the claim to Russell F. Locke, who, on January 26, 1938, filed a statement of claim in the Municipal Court of Chicago. On March 10, 1938, pursuant to order, he filed a bill of particulars. The statement of claim and bill of particulars sought recovery of the sum of $16,300.00, "as the usual, reasonable and customary charge for the services rendered", and in addition thereto the sums expended for the use of defendants. The affidavit of defense, filed on March 17, 1938, denied that the fair, reasonable and usual customary value of the services was $16,300.00, and averred that by reason of the want of reasonable care and skill of and improper advice given by the firm, the services were of no value. Defendants also filed a counter claim which asserted that the members of the firm did not exercise reasonable care, diligence or skill in and about the rendition of the services, gave improper advice, and that as a proximate result defendants sustained damages, for which

they sought judgment against the members of the firm, including plaintiff, in the sum of $6,445.40. Plaintiff filed an affidavit of defense to the counter claim and thereby joined issue. A trial before the court and jury was commenced on January 31, 1939 and ended on February 6, 1939. A sealed verdict finding the issues for the plaintiff in the sum of $8,000.00 was returned on February 7, 1939. Thereupon defendants made an oral motion for a new trial and for a judgment non obstante veredicto. On the same day, judgment on the verdict was entered. On February 17, 1939, after argument, the court overruled the motions for a new trial and for a judgment non obstante veredicto. On March 3, 1939, defendants filed a written motion, asking that the judgment be vacated, that the court reconsider the motion for a new trial previously made, that the court vacate the order overruling the motion for a new trial, and that the court grant a new trial. The written motion assigned 21 points as reasons why the court should follow defendants' suggestions. The 12th point stated that "the court prejudiced the defendants by stating in the presence of the jury that in its opinion a charge of $10.00 per hour for legal services was a reasonable and customary charge." The written motion was argued on March 10, 1939, and continued to March 17, 1939. On the latter day in the course of the argument, the court asserted that he believed that in the presence of the jury he had expressed an opinion that a charge of $10.00 per hour for legal services was a reasonable and customary charge. Counsel for the opposing parties searched the transcript of proceedings at the trial and did not find that such a remark had been made in the presence of the jury. It does not appear that any objection was voiced to the making of such remark. The court finally stated that he believed that the remark was made in the presence of the jury. For that reason alone the court on March 17, 1939, sustained the motion to vacate the judgment and for a new trial. Thereupon plaintiff petitioned

this court for leave to appeal from the orders of March 17, 1939, which was granted.

The first point urged by plaintiff is that the written motion is a nullity and that the order entered pursuant thereto granting a new trial, is void. Rule 177 of the Municipal Court of Chicago provides that:

> "Any party dissatisfied with the verdict of a jury may move for a new trial. The practice in relation thereto shall be as follows:
>
> "(1) Such motion, if made immediately upon the announcement and entry of the verdict, or when both parties are present in court in person or by attorneys, may be made orally and when so made shall be entered by the clerk and shall be disposed of at such time as the court may deem proper.
>
> "(2) When the motion is not made in the manner specified in the preceding paragraph, it shall be made in writing and filed with the clerk and a copy thereof shall be served upon the opposing party within five days after the entry of the verdict."

Plaintiff insists that the written motion was filed in violation of the rule. The oral motion had been disposed of prior to the filing of the written motion. There is no provision in the rule for the filing of a second motion for a new trial. Section 21 of the Municipal Court, (Section 376, chapter 37, Ill. Rev. Stats. 1937) provides:

> " * * Every judgment, order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court, provided a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error <u>coram nobis</u> may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit courts."

The written motion for a new trial and to vacate was entered within 30 days from the entry of the judgment. Rule 177 relates to motions

The written motion for a new trial and to vacate and entered within 30 days from the entry of the judgment. Rule 177 relates to motions

for a new trial. Section 21 of the act deals with the vacation and modification of final judgments, orders and decrees. In our opinion, rule 177 does not affect the vitality of Section 21. Clearly the court had the power, on a proper showing, to vacate or modify the judgment within the 30 day period. And an examination of the record discloses that counsel for plaintiff recognized that the court had jurisdiction to entertain the motion.

Courts of review are reluctant to set aside orders granting new trials. We are called upon to determine whether the court was right in sustaining the motion for a new trial. Plaintiff invites our attention to the fact that the court in granting the motion did so because he believed that he had in the presence of the jury made the statement heretofore mentioned. The Civil Practice Act encourages the trial judge to state for the record the reasons for his rulings. Nevertheless, we agree with the contention of defendants that they are not deprived of the right to urge all points raised by them regardless of the fact that the trial court did not specifically allude to such points. Judgments, decrees and orders will be affirmed if correct, irrespective of the reasons assigned by the court for their entry. Hence, we will consider all the points that were raised in the written motion.

Four lawyers (including plaintiff) testified in behalf of the plaintiff as to the reasonable value of the services performed. Plaintiff maintains that the firm spent 308 hours in the preparation of a contract, documents and a lease, 369 hours on various conferences, 749 hours in preparing briefs, 165 hours in court and 43 hours, characterized as "Miscellaneous". Such witness said that the reasonable charge would be at the rate of from $10.00 to $20.00 an hour for the services rendered. Three lawyers testified in behalf of defendants that the reasonable value for the services would be from $5,000 to $6,000. The opinions expressed by the lawyer witnesses

who testified on both sides of the case, whether upon a per hour basis or otherwise, were predicated upon hypotheses which assumed that the services were performed in a reasonable, careful and skillful manner. The criterion for allowing attorneys' fees is the reasonable value of the services, taking into consideration the nature of the controversy, the skill and labor required, the responsibility imposed, the standing and ability of the attorney, the time necessarily spent and the results obtained. The question is not what is reasonable, just and proper for the attorney in the particular case, but the reasonable charge between parties competent to contract. The witnesses for plaintiff, over the objection of defendants, were allowed to testify as to the fair and reasonable charge per hour for the services rendered. It must be remembered that plaintiff was insisting that the services he rendered were necessary and that he was at all times diligent and competent. Defendant contended to the contrary. As pointed out, one of the elements to be considered in determining what is a reasonable fee is how much time was necessarily employed in behalf of the client. Plaintiff urged that all the time he employed was necessary, and contended, in effect, that the reasonable and usual charge for the services would be the number of hours spent, multiplied by the value per hour. We do not see any real difference between that method of computation and the method urged by counsel. Counsel for defendant has not called our attention to any case which states that it is improper to arrive at the value of services on an hourly basis. We are of the opinion that such a mode of arriving at the value of services is not improper, providing the jury takes into consideration the elements we have mentioned namely, the nature of the controversy, skill, experience and labor required, time necessarily spent, professional standing, ability of counsel and results obtained.

Defendants maintain that the court erroneously admitted evidence of a custom in the legal profession for charging upon an hourly basis. They insist that no showing had been made of any knowledge of any such custom on the part of any of the defendants. Defendants cite the case of Kelly v. Carroll et al., 223 Ill. App. 309, where at page 315, the court said:

> "While it may be true that real estate boards and renting agencies have sought to establish such a custom by their rules, yet the custom cannot be made applicable to plaintiff unless it is shown that he had actual knowledge of the existence of the custom or that he had had previous transactions or a course of dealing of such a nature that knowledge on his part of the existence of the custom might be presumed. When the custom of a particular trade, business or profession is involved, its existence cannot be regarded as having entered into the contracts of others not engaged in such trade, business or profession unless such persons have had actual knowledge of the custom or are shown to have been previously engaged in transactions where the custom has been recognized."

We agree that plaintiff did not establish a basis on which to establish a custom to charge at an hourly rate. Plaintiff, however, did introduce evidence of what should be the reasonable charge for the services rendered.

Defendants insist that the verdict is contrary to the weight of the evidence. Plaintiff sought the sum of $18,300.00 for services. He was paid $1,000.00 on account. The jury awarded him $8,000.00. It is unlikely that the jury, if it heard the remark of the court was influenced thereby. In a certain document prepared by the law firm, defendants admitted that they were indebted to the plaintiff in the sum of $5,000.00 up to the time the document was prepared. Defendants also prepared a statement which was to be used as a basis for a claim against a contractor by the name of Goldberg. In that statement the amount of $16,510.00 claimed by plaintiff appears as an item in the claim that defendants were asserting against Goldberg. Defendants state that at the time they signed the documents, they did so on instructions of their then lawyers and without reading them. Defendants urge that in view of the

circumstances the statements made by them should not be considered as admissions against them.

We do not believe that the remark by the court, if made in the presence of the jury, affected the verdict. There was no objection to the remark. The parties did not then feel that the jury would be prejudiced thereby. Defendant also complains that plaintiff refused to separate the hours which he personally spent, from the hours which his assistants spent upon work for the defendants. The record shows that the information as to hours spent by the assistants, who were lawyers, was given. Plaintiff was interrogated with respect to his opinion on the law governing the obtaining of a bond for costs in a case in which plaintiff represented the defendant. No objection was voiced at the time. Defendants, by their experts, sought to establish the law as to the giving of a bond for costs. The court sustained objections to that line of questions. The court was right in so doing. During the trial plaintiff, over objection, was permitted to show that suit had been instituted by defendants upon a surety bond of a contractor. In our opinion, the court should have sustained the objection to the admission of that evidence, as it tended to confuse the jury.

On the contention of defendants that the services rendered were of no value, that reasonable skill was not exercised, that improper advice was given and that the services were unnecessary, we observe that voluminous testimony was introduced to establish the respective contentions and the jury found for the plaintiff. In so doing the jury necessarily decided the issues of skill, diligence, necessity and reasonableness in favor of plaintiff. There is abundant evidence in the record to sustain the verdict of the jury in that reppect. Defendants point out that the most important item of hours claimed was for 749 hours which plaintiff asserts were consumed in

the preparation of briefs. The briefs, according to the testimony in behalf of plaintiff, covered 77 different subjects. When requested on cross-examination to exhibit some evidence of the labor on the briefs, plaintiff stated that all of the briefs had been destroyed. Defendants assert that there was no substantial evidence offered as to the necessity of spending 749 hours in the preparation of briefs.

A careful consideration of the entire record convinces us that by the manifest weight of the evidence, plaintiff is entitled to recover a reasonable fee for the services rendered. A full consideration of the evidence convinces us that the defendants recognized that the services of the law firm were reasonably worth at least $5,000.00. We are of the opinion that substantial justice will be done if a judgment is rendered in the sum of $5,000.00. Therefore, if within 10 days from the filing of this opinion, plaintiff will file in this court a remittitur of $3,000.00, the order vacating the judgment and granting a new trial will be reversed; otherwise, the order vacating the judgment and granting a new trial will be affirmed.

ORDER VACATING JUDGMENT AND GRANTING NEW TRIAL REVERSED UPON REMITTITUR OF $3,000.00; OTHERWISE, ORDER VACATING JUDGMENT AND GRANTING NEW TRIAL AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

40604

HENRY A. MILLER,
(Plaintiff) Appellee,
v.
BARTLETT STATE BANK, a Corporation,
(Defendant) Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

301 I.A. 615

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action instituted by the plaintiff, a real estate broker to recover a commission alleged to be due him for procuring a proposed purchaser who submitted a written offer for the purchase of a residential property owned by the defendant, which offer was rejected by the directors of the defendant bank.

The complaint alleges that on the 2nd day of September, 1937, the defendant owned the premises in question, that the plaintiff was a licensed real estate broker, that the defendant listed the premises with the plaintiff to sell at a designated price, it being understood that the plaintiff was to receive a commission for services if the same was sold to a purchaser procured through the efforts of the plaintiff; that plaintiff procured a purchaser for the premises who was ready, willing and able to purchase the same at a price satisfactory to the defendant, but that the defendant sold the premises to another party, namely the tenant residing therein, and rejected the plaintiff's purchaser without any cause, although he was ready, willing and able to purchase. Wherefore the defendant became liable to the plaintiff for the customary charge for services in Cook County, which is $350.00, and it was for this amount that the plaintiff sued the defendant. Subsequently an amendment to the complaint was filed by the plaintiff in which he alleges that the contract was an oral contract, that the plaintiff had business with Herbert E. Schnadt, cashier, and E. J. Schmidt, president of the defendant bank, and that the name of the prospective purchaser was Ronald A. Deabler.

Defendant's answer to the complaint admits ownership of the premises and that the plaintiff was a licensed real estate broker, but denies all other allegations. The defendant made a motion to dismiss the complaint for insufficiency and for other reasons, one of which is that the plaintiff has failed to set forth the agreement between the parties, if there was any, and alleges that the listing with the plaintiff was not an exclusive listing and that the property was listed with many other brokers at that time at a price of $7,350. The defendant denies that the plaintiff is entitled to a commission of $350, or any part thereof. The defendant filed motions to strike the complaint and the plaintiff was ordered to file, and thereafter did file, an amendment to the complaint, whereupon another motion was made by the defendant to strike the bill of complaint as amended and to dismiss the complaint, which motion was overruled by the court.

The defendant bank is located at Bartlett, Cook County, Illinois. Its cashier is one H. E. Schnadt, who contacted the plaintiff, Henry A. Miller regarding the sale of the defendant's real estate, a small residence located at 4110 Howard Avenue, in Western Springs, Illinois, by its letter to the plaintiff dated September 23, 1936, at which time it informed the plaintiff that it would be interested in selling the property, and stated that "if we can get fair down payment with terms for the balance" for the plaintiff to work on it and that it would take this matter up with the directors at an early meeting. It appears from the evidence that from that date on the plaintiff's real estate office and the defendant's cashier communicated with each other several times during the year and at frequent intervals regarding the sale of this real estate. On June 30, and July 29, 1937, the cashier, H. E. Schnadt, wrote to the plaintiff's office asking for reports from the plaintiff concerning any offers it had received regarding the purchase of the premises. On September 4, 1937, the plaintiff with his agent and employee

Mertsky called at the defendant's bank with a written sales contract and offer signed by Ronald A. Deabler for the purchase of the premises in question at the price of $6,750. The cashier, Schnadt, was then interrogated regarding this offer and he replied to the plaintiff that "they had hoped they would get more for the property, but if that is the best they can do they would take it under consideration." The cashier called in Mr. Schmidt, the president of the bank, and later telephoned to one Mr. Hattendorf, a director of the bank, concerning the sale of the property. The cashier and the president then stated to the plaintiff that "if this proposition was for $7,000, $1,000 cash and $50 a month, they would be inclined to accept it right then and there." Later in the same day the plaintiff returned to his office and procured Deabler to make a new offer in the form of a newly executed contract for the purchase of the premises at the terms described by the cashier and the president. After securing this new offer from Deabler, the plaintiff and his agent called at the defendant bank again on Tuesday evening, September 7, 1937, and were present at a directors' meeting, when they were requested to leave and remain outside the building so that they (the directors) could talk over the contract and study the same. Prior to this same time and meeting the plaintiff delivered the $7,000 offer and contract together with a detailed credit report on Deabler to H. E. Schnadt, the cashier. Schnadt had previously told the plaintiff that the $6,750 contract was to be "turned down * * * because Mr. Hattendorf had told them he could make a sale to another party at the same price and at the same terms and that they wouldn't have to pay any commission." Upon delivery of this new $7,000 Deabler offer and contract on September 7, 1937, the plaintiff met Mr. Schmidt, the president, and Mr. Schnadt, the cashier. These men then said to him that "this looks a lot better", and they further said that "because Mr. Hattendorf, one of the directors, wasn't there that they would want to first tell him of this

second proposition but that I was agreeable to them and that they would sign the contract within two days and would send it to me together with guarantee policy for us to continue the guarantee policy * * "that they didn't want to do it without consulting the other man."

After the meeting on September 7, the plaintiff left his contract and credit report with the defendant and awaited the delivery of the signed contract and directions concerning securing the guarantee policy, title letter or opinion suggested by their conversation. Not having heard from the defendants for four days, the plaintiff on Friday previous to September 11, 1937, called Mr. Schnadt, the cashier, on the telephone and "asked him why I had not received the contract. He said he thought they were going to make a deal with the other man because he was going to raise the offer. The other man's name was not mentioned. I heard nothing further and then I received the letter dated September 11." On September 13, 1937, the plaintiff received by mail the Scobler contract with the $7,000 offer and the credit report, together with a letter dated September 11, stating that "the directors saw fit to accept another proposition for the sale of the house."

It further appears from the evidence that the bank sold this property to one Fitzgerald at the same terms and price as were presented by the plaintiff. It further appears to be undisputed that Hattendorf acted as a broker in this sale and received $350 in the transaction. It is also evident from the testimony of Fitzgerald, the purchaser, that he did not sign any contract or offer to purchase this property until "about a week or ten days later, "after September 1. This, according to the statement of the plaintiff, would make his offer as of September 8 or September 11. It further appears that on the day it was decided by the bank to sell the property to Hattendorf's prospect, Hattendorf was present at a meeting and that he voted on the sale to his own prospect. It appears from the evidence that there

was a dispute as to whether Mr. Hattendorf, the director, was present on the day the Fitzgerald deal was consummated, September 8.

The questions of fact in this case are controverted. However, the matter was submitted to the court, who saw and heard the witnesses, passed upon their credibility and the weight of the evidence, and entered a judgment for $350 for the plaintiff. It is from this judgment that the defendant appeals.

As previously stated, the questions are ones of fact, and in passing upon the evidence this court will assume that the trial court disregarded all incompetent evidence in arriving at and entering judgment.

Turning to the evidence in this case it is not disputed that Henry A. Miller, the plaintiff, was employed to procure a purchaser at the price of $7,000, and from plaintiff's evidence there can be no doubt that Deabler was ready, able and willing to make the purchase on the bank's stated terms. It is apparent that the bank refused to complete the sale after the plaintiff had fully performed his duty, for the reason that the officer of the bank joined with one of the directors in making the sale to Fitzgerald and paid this director a commission of $350. It further appears from the evidence in the record that upon delivery of this second offer of $7,000 by Deabler on September 7, 1937, the president and the cashier told the plaintiff that "this looks a lot better", and they both stated - as we have already indicated in this opinion - that they would sign a contract within two days and would send a guarantee policy to the plaintiff and for him to continue the policy, which no doubt was for the purpose of bringing the title down to date.

In considering the evidence the court undoubtedly reached the conclusion that the plaintiff had earned his commission and was entitled to it, and this court cannot say that his finding for the plaintiff for $350 is against the manifest weight of the evidence, and it is here affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

[illegible]

conclusion that the liability has been fixed [illegible] entitled to it, and this court cannot say that [illegible] for the plaintiff for $250 is against the manifest weight of the evidence, and it is here affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J., [illegible]

40629

BOYNE PLATT, et al.,

Appellants,

v.

JOE FISCHER, UNION BANK OF CHICAGO, a corporation, as trustee, and HARRY R. SPELLBRINK, as receiver of UNION BANK OF CHICAGO,

Defendants.

UNION BANK OF CHICAGO, a corporation, etc., and HARRY R. SPELLBRINK, as receiver of the Union Bank of Chicago,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

301 I.A. 615

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is the second appeal from a decree entered in the above entitled cause. The first appeal was by the defendant Joe Fischer, who was permanently enjoined from the prosecution of his action at law pending in the Superior Court of Cook County against the defendants in that suit, namely: Boyne H. Platt, Henry S. Fritz, Clifford Older, William G. Mawhinney, Fred Oswald, Margery Jane Consoer, H. B. Stolz, R. A. Smith, Fred Consoer, Grace A. McLean and Ruth Kent, to recover moneys alleged to be due to him.

The decree appealed from was reversed by this court, and the opinion is reported in 285 Ill. App. 110. The appeal now pending is by the plaintiffs and is based upon a complaint in which they allege that Joe Fischer had brought a suit at law against them; that he claimed to be entitled to damages against them as beneficiaries of a land trust, from which Fischer had bought a lot, for which he had paid, and for which the Union Bank and its receiver had failed to execute and deliver to him a deed and a guaranty policy. Fischer, and the bank and its receiver, were made defendants, and the prayer of the complaint is in part as follows:

> "That the court determine the rights and liabilities of all of the parties to the suit, in connection with the matters in controversy; that the court pass on the right of the defendant Fischer to declare a rescission, and if he is entitled to sue

for the money he had paid, or for damages, that the court ascertain and fix the same, and find from whom such recovery should be had, and enter judgment accordingly, and that the court enjoin the prosecution of the suit at law, and for other relief."

The matter was heard before a master, who filed his report, and in the original case, which was here on appeal, found for the plaintiffs. The chancellor in passing upon the exceptions to the master's report, sustained the report, overruled the exceptions and entered a decree. From this decree Fischer perfected an appeal and this court, in passing upon the subject, reversed the decree of the Circuit Court and denied a rehearing. The Supreme Court later denied leave to appeal to that court.

We said in Platt v. Fischer, 285 Ill. App. 110, in part:

"The Circuit Court has jurisdiction of all the parties involved in the suit at law, of the parties involved in this proceeding, and of the entire subject matter, and of all things involved in both proceedings. Upon the undisputed facts before it, and in view of the conflicting interests of the parties, the court should have asserted its jurisdiction and entered a decree in Fischer's favor, ordering that the amounts paid out by Fischer on account of the purchase of the lot, together with the amounts paid by him for taxes and special assessments on the land, be paid to him. If the moneys in the hands of the clerk of the court are not sufficient for this purpose, and there are not sufficient funds in the hands of the successor trustee, on account of the Fischer purchase, to pay the balance due Fischer, then it is our opinion that the beneficiaries named - the complainants in this proceeding - are liable to reimburse Fischer for any further amounts found to be due him."

And upon the issues as presented in that opinion, the case was docketed in the Circuit Court and the matter was again considered by the court, and the plaintiffs moved that the case be re-referred to the master, and that no decree be entered until all issues could be disposed of, or that, without re-reference, the decree dispose of all issues in the case.

The court overruled these objections, but without passing on the motion for a re-reference, and entered a decree in favor of Fischer, decreeing that there is due Fischer $2,472.86, and entered judgment

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other [illegible]

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or that, [illegible]
the case.

The [illegible]
the motion for a re-reference, [illegible]
according that there is due diligence [illegible]

for this amount. Thereafter the court entered an order re-referring the case to the master in chancery with directions to entertain the further arguments of the parties, if any, and to make and present his recommendations and conclusions to the court upon those issues presented by the pleadings that have not been disposed of, being principally the question of whether the defendant James S. Rodie, receiver, of the Union Bank of Chicago was liable to reimburse the plaintiffs for the amount of money recovered from them by Joe Fischer.

Upon the motion of the plaintiffs made in this court for leave to withdraw the Circuit Court record, the motion was allowed and the record withdrawn and presented to the master and then to the chancellor and returned to this court following the entry of the order here appealed from.

The plaintiffs suggest that the master heard no new evidence other than as to the loss and damage the plaintiffs had sustained by reason of being held liable to Fischer, both before and after the former appeal. This evidence was not objected to, nor was the propriety of any item as an element of damage questioned, but the bank and its receiver denied being liable for any of it.

Subsequently, the master filed his report upon the re-reference, and on January 9, 1939, the court entered a supplemental decree reciting that the cause came on to be heard upon the entire record, and the court having considered theopinion of the Appellate Court filed upon the previous appeal, and being of the opinion that the said opinion of the Appellate Court (reported in 285 Ill. App. 110) determined that the defendants, Union Bank of Chicago and Harry H. Spellbrink, as successor-receiver of the Bank, were not liable to reimburse the plaintiffs for any amount they might be required to pay to the defendant Joe Fischer, and ordering that the plaintiffs be barred from having any claim against the defendant by reason of the payments made to Fischer or expenses incurred, that exceptions of

the defendants to the master's report be sustained and allowed, that the report of the master on the re-reference be overruled and disallowed, and that the plaintiffs pay the costs, including the fees of the master. It is from this order that the appeal by the plaintiffs is now in this court.

Originally the plaintiffs filed this suit seeking to restrain one of the defendants, Joe Fischer, from prosecuting an action at law against them in the Superior Court seeking a return of the money he had paid under a land contract covering the sale to him of a lot in a Cook County subdivision. Though the plaintiffs were successful in the Circuit Court, upon appeal the defendant Joe Fischer was held entitled to rescind his contract and to recover the money he had paid on account thereof from the plaintiffs, who were the beneficial owners of the subdivision. The defendant, Union Bank of Chicago, held title to the subdivision for the benefit of the plaintiffs under a trust agreement, and the question involved upon this appeal is whether, after the plaintiffs were decreed to repay to the defendant Fischer the amount he had paid in under his land contract, they, in turn, can recover such amount from the defendant bank or its receiver. This court upon the former appeal decided the question against the plaintiffs.

The opinion of this court in Platt v. Fischer, 285 Ill. App. 110, after pointing out that the question had been raised of the ultimate liability of the bank to the plaintiffs in the event of their liability to the defendant Fischer, the court held in Fischer's favor and ordered that the amounts paid out by Fischer on account of the purchase of the lot, together with the amounts paid by him for taxes and special assessments on the land be paid to him. Then the court directed that "if the moneys in the hands of the clerk of the court are not sufficient for this purpose, and there are not sufficient funds in the hands of the successor trustee, on account

of the Fischer purchase to pay the balance due Fischer, then it is our opinion that the beneficiaries named - the complainants in this proceeding - are liable to reimburse Fischer for any further amounts found to be due him," and this decree indicates the court found that the plaintiffs were to reimburse Fischer if the moneys in the hands of the clerk of the court were not sufficient for that purpose, and there were not sufficient funds in the hands of the successor trustee on account of the Fischer purchase to pay the balance due Fischer. The language of the court is clear in that the plaintiffs are to reimburse the defendant Fischer if the moneys in the hands of the successor trustee are not sufficient to satisfy his claim, and the result reached by the court in following the terms of the trust agreement that was entered into by the trustee and the plaintiffs was justified by the agreement, wherein it is recited "that the trustee shall not be required to enter into any personal obligation or liability in dealing with the land or make itself liable for the payment of any moneys", and further, under the sub-division contract there was "no liability on the part of the trustee for anything, except such money as might come into its hands."

The instant case has been considered and the merits have been discussed and settled, and, as said in the case of Wadhams v. Gay, 83 Ill. 250, where the cause has been remanded for further proceedings in conformity with the expressed views and opinion of this court -

> "there can be no power remaining, in the court to which the opinion and mandate are sent, to re-try the cause or do any other matter or thing in the cause, but to obey the mandate. The opinion of this court was on the merits - they had been declared, by this court, against the complainants. The mandate required of the Superior Court the execution of the decree of this court, not a retrial of the cause or the entry of any order which might have that effect, and which, unquestionably, was the design of the party asking such an order."

And the court in Newberry, et al. v. Blatchford, et al., 106 Ill. 584, upon a like question said:

and the court in _Lowery, et al. v. Winterbottom, et al._, 108 Ill.

384, upon a like question said:

"It has often been held, as in Aiging v. Carr, 70 Ill. 596, this court has no power to review its previous decisions except on petition for rehearing, presented in conformity with the rules of this court, and th t has been done once in this case. It is now useless to ask this court to re-open the discussion of the same questions previously determined, on the applic tion of the same parties, and especially so in view of the fact no new or different questions are presented, so far, at le st, as complainants in the original bill are concerned."

No other questions have been presented which would justify a reversal of the order entered in Platt v. Fischer, and reported in 285 Ill. App. 110, on the previous appeal.

We have considered the questions which we regard as pertinent to the appeal in the instant case, and are of the opinion that the decree of the court should be and it is hereby affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

40650

MARIE GIANGROSSO,

(Plaintiff) Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

301 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff on a policy of insurance issued by the defendant company on the life of Antonio Giangrosso. A trial was had before the court and a jury, resulting in a judgment upon the verdict in favor of the plaintiff and against the defendant in the sum of $480, from which judgment the defendant appeals.

In the amended statement of claim it is alleged that George Hecker is the administrator of the estate of Antonio Giangrosso and that an order had been entered allowing him to substitute in place of Maria Giangrosso. It is further alleged that on January 8, 1934, the defendant delivered to Antonio Giangrosso a policy of insurance in the amount of $480; that on May 8, 1934, Antonio Giangrosso died; that the defendant by its agent solicited Antonio Giangrosso in his lifetime for the policy; and that Antonio Giangrosso truthfully advised the defendant's agent of all the material facts pertaining to the matter involved.

It is admitted by the defendant in its affidavit of merits that the policy was issued and it is averred that Antonio Giangrosso was not in sound health on the date the policy was issued; that within two years prior to the date of the policy he had been attended by a physician for a serious disease or complaint and that by reason thereof the defendant had declared the policy void and the liability of the defendant was the amount of the premium paid on the policy.

From the facts it appears that the policy sued upon is

dated January 8, 1934, and was issued without a medical examination. It is on the life of Antonio Giangrosso for $480, and is payable to the estate of the insured. It also appears that the company assumes no obligation, except the return of the premiums paid, if the insured is not in sound health on the date of the policy, or if the insured has within two years before the date thereof been attended by a physician for any serious disease or complaint. The insured worked steadily prior to January 8, 1934. He was admitted to the Cook County Psychopathic Hospital on January 26, 1934, and to the Chicago State Hospital on February 1, 1934. He died at the Chicago State Hospital on May 8, 1934.

From the evidence Sarah Giangrosso, daughter of the deceased insured, testified that she was present at the time the application for insurance was given to two of the agents of the defendant company. She at first described one of the agents as a Mr. Rocco, but later corrected her testimony and identified the two agents as Mr. Henry and Mr. Cerani. She testified that her father was asked by the agents regarding his age and place of birth, where he was working and if he had been working steadily; that her father was then asked if he had been ill, and her father answered, "Yes" and that he informed the agents that he had visited Dr. Campione, and that her father stated that he did not know what was wrong with him. It further appears from her testimony that her father could not write or read English. She further testified that there were no other questions asked of her father than those above stated; and that her father was working steadily prior to January 8, 1934, the date of the policy.

Dr. Kibler, who was called by the defendant, testified that he was connected with the Chicago State Hospital; that he examined the insured on February 1, 1934; that his heart was negative; that there were no murmurs at all; that his diagnosis was that of alcoholic psychosis; that the diagnosis of myocarditis was made a few days

that he was connected with the Chicago [illegible]; that he attended the theatre on January 1, 1924; what his mental condition; that there were no symptoms at all; that his diagnosis was that of alcoholic psychosis; that the diagnosis of myocarditis was made a few days

before May 8, 1934; (the insured died on May 8, 1934) that myocarditis is a weakening of the heart muscles. The doctor further testified that he saw the patient every day.

Dr. Urse was also called as a witness for the defendant. He testified that he first saw the insured on January 26, 1934, the day he was admitted to the Psychopathic Hospital; that he made an examination of him; that his record included a physical examination, and that he made daily observations of the patient; that the patient was suffering from chronic alcoholism with dementia, and that the dementia was the result of the chronic alcoholism.

Dr. Campione was also called as a witness for the defendant, and testified that he saw the insured in the early part of 1933, and that he diagnosed the insured's condition as syphilis of the brain; that he did not disclose the true nature of his condition to the patient.

A further witness for the defendant was Dr. Bellizi, who testified that he saw the insured in the winter of 1930 or 1931; that "there was no examination made on him but the suspicion was a uretic condition;" that he did not get any history of excessive drinking; that he did not tell the patient that he had syphilis; that he did not know that the patient had syphilis except from the clinical observation, and that he made no surgical examination of the patient; that no Wassermann test was made.

John Gerani was also called on behalf of the defendant and testified that he and Mr. Henry, agents for the defendant, took the application for insurance on December 21, 1933; that Sarah Giangrosso was present; that the witness understood the Italian language and that Mr. Henry did not; that he was not told by the applicant that he had been treated by doctors. Mr. Henry testified that he and Mr. Gerani took the application for insurance; that the applicant spoke in the Italian language and spoke no English; that

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language and that [illegible] not; that [illegible] not [illegible] the
applicant that he had been treated by doctors. [illegible] testified
that he and Mr. Israel took the application for insurance; that the
applicant spoke in the Italian language and spoke no English; that

he, the witness, does not speak nor understand the Italian language.

The application was not attached to the policy but was introduced in evidence over plaintiff's objection.

The defendant contends that the plaintiff cannot recover under a policy of life insurance which states that the policy will not take effect if on the date thereof the insured is not in sound health and if within two years prior thereto he has been attended by a physician for a serious disease, where the evidence shows that he was not in sound health on the date thereof and that he had been attended by a physician for a serious disease within two years prior thereto.

The plaintiff answers this theory by stating that upon the issue of the alleged misrepresentations, both as to health and attendance by a physician, the jury had before it the evidence of both parties and decided that issue in favor of the plaintiff.

In discussing the law relative to questions of this kind, the defendant calls our attention to the case entitled, Eastern and Southern Life Ins. Co. v. Tomasun, 358 Ill. 496, and points to the policy, which contains a provision that no liability shall attach thereunder until it had been issued and delivered during the lifetime and good health of the applicant and the applicant in that case, Mrs. Tomasun, misrepresented the conditions of her health in the application and denied she had cancer. However, in the instant case there is evidence that when asked by the agent regarding his age, place of birth, where he had been working and whether he had been ill, the plaintiff to the latter question answered, "Yes" and informed the agent he had gone to a Dr. Campione, and further stated he did not know what was wrong with him. It appears, however, that his answers were not correctly inserted in the application for the insurance, and this evidence is the evidence of Maria Ciangrosso, the daughter of the deceased insured, and under the circumstances it was

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insurance, and this evidence is the evidence of [illegible], the
daughter of the deceased insured, and under the circumstances it was

proper for the court to submit this question to the jury, which it did. In commenting upon the case of Western and Southern Life Ins. Co. v. Tomasun, supra, the court did say:

> "It is not denied in the record that the answers of the insured as shown by the application, which is a part of the policy, were, in fact, false. Neither is it denied that she was not in good health at the time the policy was issued and delivered to her."

And the court further said:

> "In an equitable action for the cancellation of an insurance policy upon the ground that misrepresentations had been made as to facts material to the risk, it is not essential that the applicant should have wilfully made such misrepresentations knowing them to be false. They will avoid the policy if they are, in fact, false and material to the risk even though made through mistake or in good faith."

This authority is not applicable to the state of facts before us here. The plaintiff evidently advised the agents that the deceased had called on a physician regarding his health condition and that he himself did not know what was wrong with him and the agents disregarded his statement because they were not included in the application for insurance. However, the question being one of fact and one of the agents having denied that the applicant made the statement as testified to by Maria Giangrosso, it was for the jury to determine whether there were any fraudulent representations made in the application for insurance, and the jury having decided that question and there being evidence tending to support their decision, we are inclined to agree with the court that the verdict is properly sustained by the evidence.

The plaintiff calls our attention to the case of Weisguth v. Supreme Tribe Ben Hur, 273 Ill. 541, in which the Supreme Court said:

> "The whole controversy centered upon the question whether the information as to her true condition had been given to the medical examiner, and, if so, what effect it had on the right to recover."

The court upon the question said:

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2a. V. [illegible]

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evidence.

[illegible]

v. Further [illegible]

said:

"The whole controversy centered upon the question whether the information on to bar the condition has been given to the medical examiner, and, if so, what effect is had on the right to recover."

The court upon the question said:

"The jury, therefore, in order to arrive at a verdict in favor of the beneficiary necessarily found that the deceased did impart to the medical examiner full information as to her true condition, and this finding has been finally approved by the judgment of the Appellate Court."

and the court in further passing upon the question said:

"In passing upon a similar question in Provident Life Assurance Society v. Cannon, 201 Ill. 160, we said: 'Notice to the agent, at the time of the application for the insurance, of facts material to the risk is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. (Phenix Ins. Co. v. Hart, 149 Ill. 513; Home Ins. Co. v. Wendenhall, 164 id. 458). Where the assured discloses facts to the agent and the agent undertakes to fill out the application, and instead of stating the facts as they are disclosed to him inserts in lieu thereof conclusions of his own, the insurance company will not be permitted to insist that the words of the agent, and not of the assured, are warranties, rendering the policy void. - Phenix Ins. Co. v. Stocks, 149 Ill. 319; Royal Neighbors of America v. Bomen, 177 id. 27; Teutonia Life Ins. Co. v. Week, 74 id. 165.'"

The plaintiff further cites in support of her position the case of Micezey v. Missouri State Life Ins. Co., 273 Ill. App. 281; and Wagleton v. Prudential Ins. Co. of America, 133 Ill. App. 306. In the latter case only the abstract of the opinion is reported, and the doctrine set forth is as follows:

"An insurer may by its conduct waive a condition of a policy of life insurance limiting its liability to a return of the premiums received if, at the date of the policy, the insured was not in good health."

The question presented to this court being one of fact, it was for the jury to determine whether there were fraudulent representations made at the time the application for insurance was signed, and we believe the verdict returned by them was justified.

The defendant contends that the court erred in giving to the jury certain instructions of the defendant and in giving to the jury certain instructions requested by the plaintiff. The first complaint made by the defendant is that the court refused to give the following instruction requested by the defendant:

"The court instructs the jury as a matter of law that if you believe from all the evidence that the said Antonio

Giangrosso had within two years before the date of the policy sued upon been attended by a physician for any serious disease or complaint you must find the issues for the defendant."

And the defendant then states that the instruction follows the language of the policy and is one of the conditions set forth therein. However, upon an examination of the instructions as a whole, we find this instruction, which has been called to our attention by the plaintiff:

"The court instructs the jury as a matter of law that if the applicant made the following representations: 'I am now in sound health and am not blind, deaf or dumb, nor have I any physical or mental defect or infirmity of any kind,' to induce the defendant company to issue the policy of insurance sued upon and if you believe from all the evidence that the said representation is false whether made knowingly or not you must find the issues for the defendant."

This in a measure takes up the very question. While the same language is not used the effect is the same, and undoubtedly the jury was advised correctly upon this question. Then the court further instructed the jury in another instruction as follows:

"The court instructs the jury as a matter of law that if any of the representations in the application are false, whether made knowingly false or not, such false representations will void the policy."

This court in the case of Rebenstorf v. Metropolitan Life Insurance Company, 299 Ill. App. 71, said:

"However, having examined the given instructions in their entirety, we find that the jury was fully and fairly instructed on the real issues involved, according to both plaintiff's and defendant's theories, and are of the opinion that the giving of this instruction constituted, at most, harmless error. In 64 C. J. 986, it is said: 'Where, however, it appears that the correct instructions must have so preponderated in the consideration of the jury that the erroneous instruction neither contributed to, nor controlled, the verdict, the charge may be upheld.'"

This applies to the instructions as given.

When all of the instructions are considered we believe the jury was fairly instructed and that the instruction complained of is not so erroneous as to justify the court in setting aside the verdict returned by the jury and upon which judgment was entered.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND BURKE, J. CONCUR.

40860

ISABELLE LEAL, (Plaintiff) Appellee, v. METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, (Defendant) Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

36

301 I.A. 616

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff to recover under the double indemnity provision of five life insurance policies issued by the defendant company on the life of Joseph Leal. The face amount of the policies was paid to the plaintiff. Upon the issues joined there was a trial before the court and a jury, which resulted in a judgment upon the verdict in favor of the plaintiff for $1,219.75. It is from this judgment that the defendant appeals.

The plaintiff alleges in her complaint that Joseph Leal was insured under policies issued by the defendant company; that on April 2, 1936, he was accidently burned about his face, arms, legs, hands, feet and body; that he was sick and disordered for approximately 30 days thereafter; that on May 2, 1936, by reason of the injuries, independently of all other causes, he departed this life; that the policies of insurance were in full force and effect at the time of his death; that notice of death and notice of the injury were given to the defendant pursuant to the policies; that the defendant had due notice of the accident and injury, and that Joseph Leal, the insured, died May 2, 1936, due to bodily injuries, the proximate result of external, violent and accidental means; that the plaintiff was the wife of Joseph Leal at the time of his death; that the defendant has made partial payment of the sum due under the policies, thereby waiving any non-compliance with or defects

in the notice of death required by the provisions of the policies; that in accordance with the terms of the policies, defendant became liable to pay the plaintiff $2,270.90; that the defendant did on June 25, 1936, pay to the plaintiff $1,135.45, and refuses to pay the balance; that the plaintiff represents on information and belief that the defendant claims that plaintiff executed a release, which the plaintiff claims was obtained by misrepresent tions by the agent of the defendant; that the plaintiff is unfamiliar with the English language, and was not informed that she signed a release, but thought she had signed a receipt; that the plaintiff demanded and the defendant has refused to pay the sum of $1,135.45 for which judgment is asked.

The defendant in its answer to the complaint admitted the issuance of the policies as alleged; admitted that Joseph Leal died on May 2, 1936; that the defendant paid the sum of $1,135.45 and avers that upon payment of $1,135.45 to the plaintiff, the plaintiff signed a receipt and release discharging the defendant; that the plaintiff had previously filed a claim with the defendant for the face amount of the policies, together with a claim for the amount alleged to be due under the double indemnity provisions of the policies, and the defendant avers that payment of $1,135.45, together with the release signed by the plaintiff constitutes a full release of all claims made under the policies sued on; denies that on April 2, 1936, Joseph Leal was accidently burned; admits that on April 2, 1936, Joseph Leal came from the rear of his home toward the street with part of his clothing on fire, but denies that he sustained bodily injuries thereby, which were due solely to external, violent and accidental means; avers that the double indemnity provisions of the policies except death resulting from self-destruction, whether sane or insane, or death caused or contributed to, directly or indirectly,

or wholly or partially, by disease, or by bodily or mental infirmity; that Joseph Leal had been suffering hallucinations; that on April 2, 1936, he poured gasoline on his clothes and body and ignited the same; that prior to that date he had been and was suffering from a luetic condition and spinal myelitis; that the diseases and bodily and mental infirmities contributed to the death of Joseph Leal, and admits that the defendant company received due proof of the death of Joseph Leal, but denies that the defendant company received due proof that Joseph Leal sustained bodily injuries solely through external, violent and accidental means resulting directly and independently of all other causes, in his death and that death was not the result of self-destruction, whether sane or insane, and that death was not caused by or contributed to, directly or indirectly, by disease or by bodily or mental infirmity; and further denies that the defendant company waived the provisions of the policies requiring proof of the death of Joseph Leal as the result of bodily injuries solely through external, violent and accidental means, resulting in his death; and denies that the release executed by the plaintiff was obtained by misrepresentations of any agent of the defendant.

From the facts in the record it appears that some time between 8:00 and 9:00 o'clock in the evening of April 2, 1936, the insured Joseph Leal was seen on the sidewalk in front of the tavern operated by John Krajac at 10300 Torrence Avenue in the City of Chicago. The upper part of his body was on fire. The witness, Krajac, and several customers in the tavern went outside, threw the insured on the ground in the snow, removed his clothes and put out the fire. The insured's widow, Isabelle Leal, the plaintiff, said that her husband had no supper the night of April 2, 1936, that he went out of their home and went into the tavern. The next time she saw him was upon his return home. He went to the tavern later on. She then saw him on fire. He was burning and she rolled him in the

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

insured [illegible]

owned by [illegible]

Chicago. [illegible]

Kraljec, [illegible]

insured on the [illegible]

the fire. The [illegible]

that her husband [illegible] that he

went out of their home and went into the garage. The last time she

saw him was upon his return home. He went to the [illegible] later on.

Shortlen saw him on fire. He was burning and she rolled him in the

snow. He was then taken upstairs to their home. She did not want him taken to the hospital, and he was not taken to the hospital until about one week later. She said she could not get a doctor that evening.

It also appears from the evidence that the day before the insured was burned he was not feeling well and he stayed at home in bed. She said he was in no condition to work. The policeman, who arrived at the insured's home about ten minutes after he was burned, wanted the insured taken to the hospital, but his wife did not want him taken to the hospital. She testified that he was all right, but began to talk funny. By talking funny she meant he was talking about a prospective trip to Mexico.

From a physical examination made by the coroner's physician there was an indication of burns of the second and third degree on the hands, forearms, and arms, also on the shoulder and neck, up to the ears. An examination of the blood of the insured made by the Molay Laboratory for the South Chicago Community Hospital, being Wassermann and Kahn tests, indicated a syphilitic condition. One of the police officers, on squad car duty in the neighborhood in question, testified he was in the neighborhood of 109th Street and Torrence Avenue on April 2, 1936, between 9:00 and 10:00 in the evening, where a man had been burned. He saw a can in front of the window of the tavern. He later went upstairs to see the man who was burned and when he came down the can was gone. It is contended by the defendant that on June 25, 1936, the plaintiff upon receipt of payment of $1,135.45, released and discharged the defendant from all demands arising under the policies sued upon. It also appears that the attending physician at the hospital where the insured died was unable to determine whether the insured's death was caused by spinal

myelitis due to burns or to positive lues (syphilis). The doctor's opinion was that there was no blood poisoning as the result of the burns.

The defendant in this action recognized its liability by paying $1,135.45 to the plaintiff, so the question naturally arises did this additional sum which the plaintiff claims accrue. However, the defendant seeks to answer this query by stating that it made a full and complete payment of the amounts due under the policies sued upon when the plaintiff signed a release for the sum she had received by the defendant's check. The contention of the defendant is that disease and infirmities of the insured contributed to his death, thereby barring recovery by the plaintiff under the terms of the policies. In other words, the defendant seeks to void the additional liability by contending that if the plaintiff was subject to infirmity or disease the action for the additional amount would be barred if the fire - the subject of the controversy - contributed to his death. The policies that were issued by the defendant and the provisions thereof are controlling. One of the provisions is as follows:

> "Upon receipt of due proof that the insured, after attaining age 15 and prior to attaining age 70, has sustained, after the date of this policy, bodily injuries, solely through external, violent and accidental means, resulting, directly and independently of all other causes, in the death of the insured within 90 days from the date of such bodily injuries while the policy is in force, and while premiums are not in default beyond the grace period specified in this policy, the company will pay in addition to any other sums due under this policy and subject to the provisions of this policy an accidental death benefit equal to the face amount of insurance then payable at death, except"

and where the insured is engaged in certain undertakings, which are specified in the policy, then the accidental death benefit will be only one-half of the amount of the policy. The exceptions, however, are not in question in this action. The sole question is whether the plaintiff is entitled to the additional amount provided for by the policy. Then again, the policy further provides that no accidental

death benefit will be paid if the death of the insured is the result of self-destruction.

Bearing upon the question of whether the plaintiff's deceased died as the result of an accident is the fact that his clothing on the occasion in question was on fire and he suffered severe burns, which were described as being so severe that it was necessary after he had been taken to his home for him to be removed to a hospital, and then a short time after his removal to the hospital he died. The question arises did the evidence indicate there was an accidental death, the result of this fire. The fact is clear that his clothing was on fire and he was severely injured by the burn that he suffered. There is no evidence that his death was the result of self-destruction, and the court is guided by the law that the presumption is that the plaintiff's deceased did not attempt to commit suicide.

In the case of Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, which is applicable to the facts as we have them before us in the pending appeal, the court said:

> "The only question of fact, therefore, left open for proof was whether the injuries which caused his death were accidental or self-inflicted. The burden of proof was upon plaintiff to show they were accidental and not self-inflicted. (Fidelity and Casualty Co. v. Weise, 183 Ill. 496.) It was not necessary, however, that the plaintiff prove by an eye-witness that the injuries which caused the death of Wilkinson were accidental, but that fact might be established by circumstantial evidence, and we think it clear from the facts in proof that it cannot be said, as a matter of law, that the injuries which caused the death of Wilkinson were self-inflicted, but that the court properly submitted that question to the jury."

The court further said:

> "In addition to those facts (set forth in the opinion) the plaintiff, in support of the theory that Wilkinson's injuries were accidental and not self-inflicted, had the right to invoke the presumption that men in the condition in which the evidence showed Wilkinson to be just prior to his injury do not ordinarily take their own lives. In the Weise case,

supra, on page 498, this court said: 'The presumption of the law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self-destruction and to cast upon the defendant company the burden of producing evidence on the point.' While this presumption is a rebuttable presumption and may be overcome by proof, when not rebutted by proof or the circumstances in evidence surrounding the death, such presumption, when taken with the admission that the injuries which caused death were violent and external, is sufficient to require the court to submit to the jury the question whether the injuries which caused the death of Wilkinson were accidental or self-inflicted."

So in this case there is nothing which would indicate that the plaintiff's deceased had suicide in mind; nor is there anything from the facts and circumstances which would indicate that he complained, nor is there any fact or circumstance from which the jury could find that the burns were inflicted by the deceased upon himself. We think the court properly submitted this cause to a jury to determine the question involved.

The defendant further contends, as we have already mentioned in this opinion, that disease and mental infirmities of the insured contributed to his death and that recovery by the plaintiff under the terms of the policy would be barred, but we believe the case entitled Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71, which has been called to our attention by the plaintiff, passes upon a like question when this court held in that case that under a policy containing clauses identical with those in the policies in this litigation, even though the insured may have been suffering from some bodily ailment, if death would not have resulted from that ailment except for the accident "the cause is nevertheless the accident, and recovery cannot be avoided or evaded", and the court adopted this language from another case, Scanlon v. Metropolitan Life Ins. Co.,

93 Fed. (2d) 942. So we are satisfied that while the bodily infirmities were present, the plaintiff may recover under an accident policy such as we have on this appeal, where the accident brought about the condition where death ensued, and we believe there was sufficient evidence in this case to justify the verdict of the jury, and the judgment entered by the court upon the verdict is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND LUCKE, J. CONCUR.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of October, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9362 Ag. No. 13

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A.D. 1938

Edith Frye,

Plaintiff-Appellee

vs.

Illinois Power and Light Corporation, a corporation,

Defendant-Appellant.

Appeal from the Circuit Court of Peoria County.

WOLFE, J.

The appellee, Edith Frye, recovered a judgment against the defendant, the Illinois Power and Light Corporation, for $26,000.00 for injury she alleges was caused by the negligence of the defendant in allowing a hole to remain in the pavement on the right of way of its street car tracks in the City of Peoria, Illinois. It is alleged that the plaintiff stepped into this hole, and as a result thereof, fell and broke her hip.

That the plaintiff did fall and break her hip is not a contraverted question, but the location of the hole, and whether the street car company had knowledge thereof, or by the exercise of ordinary and reasonable care, they would have had such knowledge, was seriously contraverted. At the close of the plaintiff's evidence, the defendant, appellant, asked the Court to direct a verdict in its favor. The motion was denied, and the same motion was presented and likewise denied at the close of all of the evidence. The jury found a verdict in favor of the plaintiff for $26,000.00. Judgment for this amount was entered. The defendant now brings the case to this court on appeal.

The appellant seriously insists that the Court erred in refusing to direct a verdict in favor of the defendant, because

there was no evidence to show that the defendant was guilty of any negligence, which was the proximate cause of the injury to the plaintiff, or that the defendant had any notice, or by the exercise of ordinary care could have had notice of any dangerous hole or depression in its right of way. An examination of the record discloses there was some evidence of these facts, therefore the case should have been submitted to the jury for their determination.

It is next insisted that the verdict of the jury is against the manifest weight of the evidence. In view of the fact that we think this case should be reversed, for other reasons, we will not discuss the weight of the evidence, which is ordinarily a question of fact for the jury's determination.

In his opening statement to the jury, the defendant's counsel started to read to the jury a count of the petition, which had been dismissed from the case, but the Court refused to let him do so. The suit was first started against the Illinois Power and Light Corporation and also against the City of Peoria, but the City of Peoria was dismissed out of the case. It is the contention of the appellant, that he had the right to show to the jury that the suit was started against the City of Peoria for the same accident. We do not think the Court erred in this matter, as this count had been dismissed from the suit, and was no part of the case at the time of the trial.

The Attorney for the plaintiff, in questioning one of the jurors relative to his competency and qualifications to serve on the jury asked the prospective juror, the following questions: "Q. You won't be interested in what might happen when your duty is done in this case, will you? A. No, sir. Q. Or in making up your verdict you won't consider anything about any appeal or anything that you have nothing to do with?" "Mr. Hamilton: I don't think that is a proper question and I object to it." "The Court: I will sustain the objection." Out of the hearing of the jury,

defendant's counsel made a motion, "to withdraw the jury and declare a mistrial, on account of the improper statement about the jury considering anything in reference to any appeal, on the ground that it was a highly prejudicial question, and I ask that a mistrial be declared and the jury withdrawn." The court overruled this motion. The Court very properly sustained an objection to this line of examination. It is difficult to see any useful purpose in such examination of the jurors. What effect it would have upon the juror being interrogated, and the other jurors, who necessarily would hear the same questions, were present in the jury box, is purely speculative, but the defendant had a right to have a jury decide the issues, without having any prejudicial matter injected into the case. We consider this line of questioning of jurors highly prejudicial, especially in a personal injury suit.

It is next insisted that the judgment of $26,000.00 is grossly excessive and is the result of prejudice and passion on the part of the jury. The appellant has cited many cases where the Courts have set aside verdicts for sums less than $26,000.00, and where from reading the cases, the injuries would appear to be more severe, than in the present case. The appellee has cited cases in which the Courts have sustained verdicts for $26,000.00 or more when the injury sustained did not appear to be as severe as the present case. It is very difficult for the court to say in any case, that the verdict is, or is not excessive, and if excessive, is it so grossly excessive that the same should be set aside and a new trial granted. What effect the prejudicial examination of the jurors may have had upon their decision in this verdict, no one knows, but a verdict of $26,000.00 ~~in the present case, to say the least is a very liberal allowance to the plaintiff for her injuries.~~

Because of the prejudicial error in the selection of the jury, and the ~~large~~ excessive amount of the verdict, we think the case should be reversed and the case remanded to the Trial Court for a new trial.

Reversed and Remanded.

prejudice on the part of the jurors against the defendant, corporation.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9457

Blue Stamp

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

301 I.A. 618

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9407 Agenda No. 2

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939.

The Prudential Insurance Company of America, a corporation,
Appellant,

vs.

Jasper St. Angel, et al,
Appellees,
F. Sidney Mariner, Trustee,
Appellee.

Appeal from the Circuit Court of Winnebago County

DOVE, P. J.

On September 23, 1926, Jasper St. Angel and wife borrowed from The Prudential Insurance Company, the complainant and appellant herein, the sum of $50,000.00, and as evidence thereof executed their note for that sum payable in annual installments of $2500.00 each and a final payment of the balance on September 23, 1936. To secure the payment of this note the makers thereof executed a mortgage to the Insurance Company on certain real estate located in the City of Rockford. This loan was negotiated by E. C. Stockburger, who was then engaged in the real estate and loan business in Rockford. According to the weight of the evidence, Stockburger, in order to make this loan, represented to appellant that the property covered by the mortgage was ample security for the payment of the amount loaned and agreed that if at any time before the note was paid in full, appellant was not satisfied that the security was ample, that then he, Stockburger, would upon request, purchase such an interest in the loan as would satisfy appellant that the amount it had invested therein was amply secured. On February 21, 1928 Stockburger and appellant entered into the written agreement hereinafter set forth and on April 7, 1928 Stockburger did purchase an interest therein by paying appellant the sum of $15,000.00 and thereafter, on December 13, 1930 Stockburger assigned his $15,000.00 interest therein to his

wife Maude E. Stockburger. Thereafter Maude E. Stockburger became insolvent and made an assignment for the benefit of her creditors to F. Sidney Mariner, trustee, appellee herein.

The mortgagors having defaulted in some of the provisions of the mortgage, appellant on August 29, 1932 instituted this proceeding in the Circuit Court of Winnebago County to foreclose its interest in this mortgage. All of the defendants were defaulted except Maude E. Stockburger. Subsequently the bill was dismissed as to her and as amended made Mariner, as Trustee, a party defendant and he filed a cross-bill and as amended this cross-bill alleged that Maude Stockburger was the wife of E. C. Stockburger and had for many years entrusted to her husband, E. C. Stockburger, moneys with which to make purchases for her on first mortgage securities. That E.C. Stockburger did purchase from appellant on February 21, 1928 an interest in this St. Angel loan to the extent of $15,000.00, without the knowledge and consent of Maude E. Stockburger and used therefor $15, 000.00 of her money. That the agreement appellant and Stockburger executed on February 21, 1928 was obtained from Stockburger because appellant threatened to withdraw from him the privilege of representing appellant in the future in making loans for it and Stockburger, fearing that it would carry out its threats and that he would lose the business and partronage of appellant, executed said instrument without consideration and without the knowledge and consent of Maude E. Stockburger. The amended cross-bill charged that Mariner's interest in said note and mortgage is superior to that of appellant and prayed that this agreement of February 21, 1928 be found by the court to have been executed by Stockburger without consideration and that appellant be decreed to hold said note and mortgage as trustee for the use of cross-complainant and to account to him for the s um of $15,000.00 and interest therein and that in the event of a sale of the property that out of the proceeds of said sale said sum of $15,000.00 and interest be first paid cross-complainant prior to any payment to

wife Vaude [illegible]

insolvent [illegible]

F. Sidney [illegible]

the court [illegible]

in the Circuit [illegible]

this [illegible]

Stockholders [illegible]

amounted [illegible]

cross-bill [illegible]

budget [illegible]

subpoena [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

that [illegible]

appellant [illegible]

by the court [illegible]

and that [illegible]

for the use of cross-[illegible]

$15,000.00 see interest [illegible] um of

property that out of the proceeds of [illegible] $[illegible],000.00

and interest be first paid cross-complainant prior to any payment to

appellant. After the issues were made up the cause was referred to a special master, who took the evidence and found the amount due appellant to the date of filing the master's report, which was April 20, 1938, was the sum of $47,022.41, together with costs and attorney fees and that there was due the cross-complainant the sum of $20,926.67 and recommended that a decree of foreclosure and sale be entered and that upon the sale after the payment of the costs and expenses of the foreclosure that there be first paid appellant the amount so found due it and that from the balance of the proceeds of sale that there be paid cross-complainant the amount so found due him. The special master overruled objections to his report, which were ordered to stand as exceptions before the Chancellor, and upon a hearing thereof the exceptions were sustained and the usual decree of foreclosure and sale was rendered, which found that the execution of the agreement dated February 21, 1928 and the subsequent payment to appellant of $15,000.00 by E. C. Stockburger were both procured from E. C. Stockburger by threats made by appellant to the effect that unless the said E. C. Stockburger would execute the agreement and make the purchase, it would take away from him the privilege of making loans for appellant. The decree further found that no consideration passed to E. C. Stockburger for the execution of said agreement and that said agreement was and is therefore void and unenforcible and not binding upon cross-complainant. The decree further found that at the time appellant received the $15,000.00 from Stockburger, it held said note and mortgage as trustee for the benefit of itself to the extent of a seven-tenth interest therein and as trustee for the benefit of Stockburger or his assigns to the extent of a three-tenth interest therein. The decree found the amounts due the appellant and appellee and directed a sale of the premises and distribution of seven-tenths of the proceeds of the sale to appellant and three-tenths of the proceeds of the sale to appellee. From this decree the original complainant appeals and the cross-complainant has assigned as a cross-error that the decree is

erroneous in not finding that he should be paid the amount the decree found to be due him in full prior to the payment to the original complainant of any amount.

The agreement above referred to dated February 21, 1928 was signed by E. C. Stockburger and on behalf of appellant by its Vice-President, Frederic A. Boyle, and attested by its Assistant Secretary, Geo. P. Williams. It was duly acknowledged and is under seal and is as follows:

> "Agreement made this 21st day of February, 1928, between E. C. Stockburger, hereafter designated as the party of the first part and The Prudential Insurance Company of America, witnesseth that,
>
> "Whereas, the party of the first part, as agent for Jasper St. Angel and Giacomina St. Angel, his wife, procured a loan from The Prudential Insurance Company of America, in the sum of Fifty Thousand Dollars, which loan was evidenced by one note, in the principal sum of Fifty Thousand Dollars, which said note was executed by said Jasper St. Angel and Giacomina St. Angel, and dated the 23rd day of September, 1926, payable to the order of The Prudential Insurance Company of America, and secured by mortgage executed by said Jasper St. Angel and Giacomina St. Angel, which mortgage is of even date with said note and is recorded in the office of the Recorder of the County of Winnebago, State of Illinois, in Book 201 of Mortgages, at Page 254, and
>
> "Whereas, in order to induce the said The Prudential Insurance Company of America to make said loan the party of the first part represented to the said The Prudential Insurance Company of America that the property described in said Mortgage was ample security for said note and that if at any time before said note was fully paid the said The Prudential Insurance Company of America was not satisfied that said note was amply secured then the party of the first part would upon request purchase such interest in the said loan as would satisfy the said The Prudential Insurance Company of America that the amount of money invested by it in said loan was amply secured;
>
> "NOW THEREFORE, if at any time before said note is fully paid the said The Prudential Insurance Company of America shall not be satisfied that the property described in said mortgage is ample security for the indebtedness upon said note remaining unpaid then the party of the first part hereby agrees that he will upon request from the said The Prudential Insurance Company of America purchase from said The Prudential Insurance Company of America an interest in said loan to the extent of

Fifteen Thousand Dollars, and in consideration thereof The Prudential Insurance Company of America agrees as follows:

"First: That the sum thus paid by the party of the first part to the Prudential Insurance Company of America shall not be considered or treated as a payment on account of said loan but as a purchase of an interest in said loan to the amount thus paid.

"Second: That The Prudential Insurance Company of America will endeavor to collect all interest as the same becomes due and that the amount of interest collected over and above that which is due The Prudential Insurance Company of America according to the terms and conditions of said mortgage and note shall be paid to the party of the first part.

"Third: That in the event of full payment of said loan The Prudential Insurance Company of America will pay to the party of the first part the sum paid by the party of the first part in such purchase with the proper amount of interest thereon.

"Fourth: That The Prudential Insurance Company of America will endeavor to collect the principal in the above loan as it becomes due and that it will not mark or treat said loan as paid until the note secured by said mortgage has been fully paid.

"Fifth: That in the event of foreclosure being necessary, which shall be wholly within the discretion of The Prudential Insurance Company of America, the amount received at such foreclosure sale shall first be used to pay the total amouht due The Prudential Insurance Company of America, together with all the costs in connection with said proceedings after which the balance, if any, not exceeding the sum paid as purchase by party of first part and secured interest thereon, shall be paid to the party of the first part.

"Sixth: It is agreed between the parties hereto that the ownership of The Prudential Insurance Company of America is superior to that of the party of the first part, as if The Prudential Insurance Company of America held a first mortgage for the amount of its interest in said debt and interest thereon as aforesaid, and the party of the first part held a second and subordinate mortgage to secure the interest of the party of the first part in said mortgage debt.

"Seventh: The interest of the party of the first part under this agreement in said note, mortgage or mortgage debt is not assignable as against The Prudential Insurance Company of America except by an instrument duly executed and endorsed upon or attached to the copy of this instrument and copy forwarded to The Prudential Insurance Company

of America at its Home Office in Newark, New Jersey and endorsed upon its records of the loan, and as acknowledged by it.

"IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, and The Prudential Insurance Company of America has caused these presents to be executed in its name by its duly authorized officers and its corporate seal to be hereto attached the day and year first above mentioned".

It is insisted by appellee that no consideration passed to Stockburger from appellant at the time of the execution of this agreement and that it is therefore unenforcible but in the langugge of appellee's counsel it "should and must be treated as defining the trust obligations of the Prudential Insurance Company". The evidence of E. C. Stockburger tended to prove that before he executed this agreement a representative of appellant told him that appellant would take away from him its loan business unless he signed the agreement. This was denied by Edward C. Higgins, who represented appellant at the time this agreement was being discussed and prepared, and at the time Stockburger signed it. According to the testimony of Mr. Higgins, who also conducted the negotiations with Stockburger in 1926, when Stockburger became the loan representative of appellant and before the St. Angel mortgage was negotiated, he, Stockburger, stated to Higgins that he would like to loan money for appellant in Rockford and that he further said he would comply with all the rules and regulations of the company, would service all loans made by him and that in the event any loan negotiated by him proved unsatisfactory that he would repurchase the loan upon the request of the company. Stockburger in his testimony denied this. The special master, however, before whom the witnesses appeared gave no credence to Stockburger's testimony and from our examination of the record we think he was justified in so doing. Stockburger, on April 7, 1928, in pursuance to the terms of the agreement of February 21, 1928, sent to appellant his check for $15,000.00 and appellant issued its receipt therefor. The evidence is that this

$15,000.00 was Stockburger's money and not his wife's and from this time on appellant treated Stockburger and his assignee as the owner of a $15,000.00 interest in this note and mortgage. On November 17, 1928 appellant sent to Stockburger its check for $415.45, being his proportionate share of the interest received by it at that time. On June 27, 1929, appellant sent its check for $419.24 to Stockburger, being his proportionate share of the interest received by it at that time. On December 18th, 1929 appellant again sent its check to Stockburger for $418.90 for the same purpose and on March 29, 1930 sent its check for $412.70 to him again for the same purpose and on April 13, 1931 sent him another check for $412.70 for his proportionate share of the interest collected by appellant upon this loan at that time. All of these interest checks were received by Stockburger, accepted and cashed. Furthermore, on December 13, 1930 Stockburger, by his written instrument, recognized that he had a $15,000.00 interest in this loan and assigned and transferred his interest to his wife and in that assignment specific reference was made to the agreement of February 21, 1928. This instrument is as follows:

> "KNOW ALL MEN BY THESE PRESENTS that, Whereas, E. C. Stokburger as agent for Jasper St. Angel and Giacomina St. Angel procured a loan from the Prudential Insurance Company of America in the sum of Fifty Thousand $50,000.00) Dollars, which loan was evidenced by one note in the principal sum of Fifty-thousand ($50,000.00) Dollars, which said note was executed by said Jasper St. Angel and Giacomina St. Angel and dated the 23rd day of September, 1926, payable to the order of the Prudential Insurance Company of America and secured by a mortgage executed by said Jasper St. Angel and wife, which mortgage was of even date with said note and is recorded in the office of the Recorder of the County of Winnebago, State of Illinois, in Book 201 of Mortgages at page 254 and
>
> "Whereas said E. C. Stokburger by Articles of Agreement made February 21, 1928 covenanted with said The Prudential Insurance Company of America at its request to purchase from said The Prudential Insurance Company of America an interest in said loan to the extent of Fifteen Thousand ($15,000.00) Dollars, same not to be considered as a payment on

account of said loan but as a purchase of an interest in said loan to the amount thus paid, all of the terms, conditions and covenants of which Articles of Agreement are fully set forth in a written instrument to which this assignment is attached, and

"Whereas on the 21st day of February, 1928 the said The Prudential Insurance Company of America did request said E. C. Stokburger to purchase an interest in said loan to the amount of Fifteen Thousand ($15,000.00) Dollars and said E.C. Stokburger pursuant to said request did purchase and acquire for a consideration of Fifteen Thousand ($15,000.00) Dollars to said The Prudential Insurance Company of America duly paid, an interest in said loan to the extent of the amount so paid and he is now the holder and owner of such interest.

"Now, I, said E. C. Stokburger, in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration to me in hand paid by Maude E. Stokburger of the City of Rockford, County of Winnebago and State of Illinois, the receipt of which is hereby acknowledged, do hereby assign, transfer, set over and quit claim to the said Maud E. Stokburger and to her heirs and assigns forever, all my right, title and interest in and to the said note or notes, bond or bonds, and the mortgage securing the payment of same, and matters and things thereby secured, and all my right, interest and claim in and to the lands and tenements in and by said mortgage deed described or conveyed, to have and to hold the same as fully and effectually to all intents and purposes as I now do or heretofore have, and with the same powers, rights and authority, subject, however, to the stipulations, agreements and covenants in said Articles of Agreement dated February 21, A. D. 1928.

"IN WITNESS WHEREOF I have hereunto set my hand and seal this 31thday of December, A. D. 1930.

E. C. Stokburger. (Seal)"

On May 20, 1931, a duplicate of this assignment was forwarded to appellant by an attorney representing Mrs. Stockburger and on November 25, 1931 Mrs. Stockburger received from appellant its check for $412.70, her proportionate share of the interest collected by appellant upon this loan at that time. This check was received by her, accepted and cashed. It thus appears, that the provision of the agreement of February 21, 1928 whereby Stockburger agreed to purchase a $15,000.00 interest in this loan was consummated and the other provisions of the agreement faithfully adhered

to by appellant and acquiesced in by both Mr. and Mrs. Stockburger and by their conduct they should be estopped from now insisting that any of the provisions of this agreement of February 21,1928 are ineffective.

We have carefully read the evidence in this case and are clearly of the opinion that the findings of thespecial master are sustained by this record. It is insisted by appellee that there was no consideration shown for the execution by Stockburger of this agreement of February 21, 1928. The substance of that agreement, however, is that Stockburger was to purchase from appellant a $15,000.00 interest in this $50,000.00 loan, and that the interest he agreed to purchase was to be subordinate to the remaining $35,000.00 interest of appellant. This agreement became fully executed on April 7th, 1928 when Stockburger did make this purchase. All the evidence is to the effect that for an express consideration of $15,000.00 paid by Stockburger, he, Stockburger, acquired a $15,000.00 subordinate interest in the mortgage here sought to be foreclosed. The agreement of February 21, 1928 contained mutual obligations on the part of Stockburger and appellant. These obligations have long since been executed by performance and it is apparent from the credible evidence in this record that this executed, sealed contract was in fact founded upon a sufficient consideration and must be held to be a binding obligation upon the parties thereto.

This contract between appellant and Stockburger, being valid and enforcible, its unequivocal provisions to the effect that Stockburger purchased a subordinate interest in the St.Angel note and mortgage to the extent of $15,000.00 can not be disregarded. By assignment, F. Sidney Mariner, as trustee, is the present owner of this subordinate interest and is entitled to the amount found to be due him in the decree, but appellant's lien upon the

to be spent [illegible] and by [illegible] that any [illegible] are [illegible].

[illegible]

obligati[illegible]

[illegible] valid and enforceable [illegible] that Stockburger [illegible] note and mortgage to [illegible] of [illegible] [illegible]ed. By assignment, [illegible] Weltner, [illegible] present owner of this subordinate interest [illegible] to the amount found to be due him in the decree, but [illegible] lien upon the

mortgaged premises or the proceeds derived from a sale thereof is superior to that of appellee and the Chancellor erred in decreeing otherwise.

The cross-error of appellee is overruled and the decree appealed from is reversed and the cause is remanded to the Circuit Court of Winnebago County with directions to enter a decree consistent with this opinion, and substantially as recommended by the special master.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG 3 - 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9424 Agenda No. 5

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Paul Henneberry,

Appellant,

vs.

Henry E. Byers, Mary W. Byers, Mary L. Donahue, The Chicago Title and Trust Company, a corporation, F. C. Pilgrim & Co., a corporation, Harold J. Hibbert, Trustee, James L. Gardiner, Mary S. Gardiner, John DeRose, Adela DeRose and Unknown Owners,

Appellees.

Appeal from the Circuit Court of Du Page County

DOVE, P. J.

Henry E. Byers and wife on June 14, 1928 executed their note of that date for $3500.00 and secured the payment thereof by a trust deed to the Chicago Title and Trust Company. Default having been made in its payment, the holder and owner thereof, Paul Henneberry, on May 15, 1936 filed his complaint to foreclose the same. The complaint, in addition to seeking the foreclosure of the trust deed, sought an accounting of the rents of the encumbered property from May 16, 19 35 to May 15, 1936, the day the complaint was filed. After the issues had been made up the cause was referred to the master in chancery who took the evidence and recommended that a decree offoreclosure and sale be rendered but found that the plaintiff was not entitled to an accounting for the rents and from a decree rendered in accordance with the findings of the master, the plaintiff appeals and seeks a reversal of that portion of the decree which denied the right of the plaintiff to an accounting.

The complaint alleged that after the maturity of the note secured by the trust deed and on or about January 23, 1934, the defendant, F. C. Pilgrim and Company, acting as agents for the owners

Gen. No. 9429 [illegible] No. 5

In the [illegible]

[illegible]

[illegible]

Perl Henderson,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

[illegible]

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[illegible]

[illegible]

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[illegible]

[illegible]

After the [illegible]

master in [illegible]

decree of foreclo[illegible]

plaintiff [illegible] this [illegible] from

a decree [illegible]

the plaintiff [illegible]

decree which [illegible] something.

The complaint alleges that [illegible] the mortgage of the note

secured by the trust deed and on or about January 20, 1924, the

defendant, E. C. Pilgrim and company, acting as agents for the owners

of the property covered by the trust deed,entered into a verbal agreement with the agent and attorney of the owner of the note and trust deed, whereby said holder and owner, in consideration of Pilgrim and Company paying to him the net rents from said property, agreed that he would refrain from instituting foreclosure proceedings for a period of six months, that Pilgrim and Company did pay said net rents for said period to the agent and attorney of the plaintiff, that thereafter by agreement of the parties said payments were continued from month to month until May 16, 1935, at which time Pilgrim and Company, in violation of their agreement, ceased making payments to the holder and owner of said note and trust deed. The complaint then alleged that Pilgrim and Company did continue to collect the rents thereafter and charged that said company either retained said moneys or turned the same over to the owners of the property. The answers of some of the defendants admitted the execution and delivery of the note and trust deed and that the plaintiff was entitled to foreclosure but denied the allegations of the complaint which,set up the agreement not to foreclose. In its answer the F. C. Pilgrim and Company averred that between May 15, 1935 and June 1st, 1935 Thomas J. Young, the attorney for the plaintiff, notified it, Pilgrim and Company, that he would make no further exten sion or arrangement similar to that under which they had been working but that he, Young, was going to Wheaton to look up the records and file a foreclosure suit, that this terminated the arrangement theretofore entered into by the parties and that thereafter the plaintiff was not entitled to any of the rents and that therefore there was nothing for which to account.

The evidence discloses that the note secured by the trust deed foreclosed herein matured on June 14, 1933, that F.C. Pilgrim and Company represented the owners of the property covered by the

to account.

The evidence [illegible] the note [illegible] trust deed foreclosed herein [illegible] June 14, 1929, [illegible] Pilgrim and Company represented the owners of the property secured by the

trust deed and Thomas J. Young represented the plaintiff, who then held and owned this note and trust deed. On May 9, 1933 the Pilgrim Company wrote Mr. Young requesting an extension of the loan, stating that if the mortgage is extended for one year that the owner would be able to make a reduction of approximately $1,000.00 at the end of that time. On May 12, 1933, Mr. Young replied to this letter requesting that the owner do something toward reducing the indebtedness. The interest due June 14, 1933 was paid and on June 27th of that year Mr. Young wrote the Pilgrim Company acknowledging the receipt of this interest and stated that the holder of the note was perfectly willing to allow the owner a six month's extension without any formal agreement. On January 30, 1934 Mr. Young again wrote the Pilgrim Company to the effect that plaintiff had agreed to the proposition of leaving the matter stand for a period of six months from the maturity of the last interest note with the understanding that the rents were to be paid to Mr. Young, as agent for the plaintiff, to be, at plaintiff's option, applied upon the interest or taxes. Without any further agreement the Pilgrim Company collected the rent and paid the same over to the plaintiff until about May 16, 1935. At that time, according to the testimony of Mr. Young, he had a conversation with Mr. Wilbur Pilgrim of the Pilgrim Company, in which Young told him that the owners should pay the back taxes. Pilgrim replied that the owners had put considerable money into the property and didn't feel as though they wanted to pay any back taxes. Plaintiff's attorney then stated that if they felt that way, it was apparent they had no further interest in the property and that he would go to Wheaton, look up the records and take up with the plaintiff whether he desired to foreclose. He testified that he did not remember saying anything about starting a foreclosure suit only that he would take up with his clients the advisability thereof. He further testified that as he understood the arrangement, he had the right to start foreclosure proceedings at any time and if

trust deed and from [illegible]
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mortgage [illegible]
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applied upon [illegible]
the filing [illegible]
plaintiff [illegible]
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felt that [illegible] it was [illegible]
property and that he wanted [illegible]
up with the plaintiff [illegible]
that he did not remember [illegible]
but only that he would [illegible] the validity
thereof. He further testified that [illegible] understood the arrangement,
he had the right to start foreclosure proceedings at any time and if

he did, the undertaking of the Pilgrim Company to turn over the rent would terminate. After this conversation, the Pilgrim Company ceased to turn over to the plaintiff any of the rents and it is the rent arising from the property between this date, May 16, 1935, and the time the complaint was filed to foreclose a year later, May 15, 1936, that is in controversy. Mr. Young further testified that two or three months after May 16, 1935 he observed that the rents were not being paid and took the matter up again with Mr. Pilgrim and that Mr. Pilgrim said it was because "I said I was going to foreclose". Mr. Pilgrim's version of these conversations between Mr. Young and himself was that on or about May 15, 1935 Mr. Young told him that there were so many taxes and special assessments delinquent that he was going to Wheaton and look them up and file a foreclosure suit. On May 21, 1935 Pilgrim wrote Young and on June 5, 1935 Young replied and in concluding his letter said: "As it stands now it looks as if the owner has practically abandoned all interest in the property so that there does not seem to be any particular reason why the holders should delay foreclosure proceedings any longer". Again on January 11, 1936, Mr. Young wrote the then owner of the property, James L. Gardiner, advising him that unless some satisfactory adjustment was made within five days, plaintiff had no alternative except to institute foreclosure and accounting proceedings.

Counsel for appellant state in their reply brief that it is not their contention that there was any express agreement, either oral or written, on the part of the Pilgrim Company to pay the rents to appellant in consideration of his forbearance to foreclose after June 14, 1934. Clearly therefore, the mortgagors and owners of the property being in default and the extension agreements having expired at that time, appellant was free to foreclose, and if he was free to foreclose, the owner was free to do what he pleased with the income from the property. But, insists counsel for appellant, when an agreement is

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appellant in [illegible]
14, 1924. [illegible]
being in default [illegible]
time, appellant was free to [illegible]
the owner was free to do what he pleased with the [illegible] from the
property. But, insists counsel for appellant, when an agreement is

entered into between two parties to do or refrain from doing certain things for a specified time and after the expiration of that period they continue to do the things agreed upon, the law will imply a contract between them for a like period of time or a reasonable time thereafter. Under some circumstances perhaps this is true, but not under the facts as they are found in this record. We think the evidence justified the finding by the master, approved by the Chancellor in the decree, that the agreement between the parties after June 14, 1934, operated as an estoppel to prevent the plaintiff from filing a proceeding to foreclose his mortgage so long as the net rents were paid to him and that the arrangement did not constitute an assignment of the rents which might be collected by the Pilgrim Company but that the plaintiff, because of the defaults and the failure of the Pilgrim Company to pay the rents to him, was entitled to foreclose. The agreement of the Pilgrim Company to turn over the rents to the plaintiff was carried out until the time when the Pilgrim Company was advised by the plaintiff that foreclosure proceedings were going to be instituted. The agreement under which the parties were then operating did not obligate the Pilgrim Company to pay the rent to the plaintiff, nor did it obligate the plaintiff to refrain from instituting foreclosure proceedings. That was Mr. Young's interpretation of the arrangement as testified to by him and if the plaintiff was at liberty to institute foreclosure proceedings at any time, certainly the Pilgrim Company was not obligated to turn over the rents to the plaintiff after plaintiff advised him he intended to foreclose. The fact that the plaintiff delayed foreclosure for a year does not change, in our opinion, the rights of the parties.

Appellant next insists that the equities in this case, so far as the rents are concerned, are with appellant and calls atten tion to the fact that the property was heavily encumbered with delinquent taxes

and special assessments and that it was highly inequitable for the Pilgrim Company to stop paying the rents to appellant to his ultimate loss and detriment as mortgagee. The evidence sustains the master's findings and the decree to the effect that Mr. Young, in May, 1935, said he was going to Wheaton to look up the records and file a foreclosure suit. Immediately thereafter, the Pilgrim Company failed to turn over the rents. Appellant knew he was not receiving the rents and had he promptly filed the instant proceeding and done what he had led appellee to believe he was going to do and had a receiver appointed, he would have placed himself in a position to secure the benefit of the rent collected from the property, but he did not do so and a year elapsed before the instant suit was filed. It is not contended that prior to the time the Pilgrim Company failed to turn over the rents to appellant or during the year which followed that the Pilgrim Company or the owners of the property did anything or said anything that misled appellant or caused him to delay instituting a proceeding to foreclose. The law makes it the duty of the owner of the property to pay taxes and the mortgagor's obligation is to pay the interest upon the note secured by his mortgage and it is always seemingly inequitable for the owner to enjoy the rents from mortgaged property and neglect to pay the taxes and refuse to pay interest upon the mortgage. Until, however, the mortgagee takes some step to protect or enforce his lien upon the mortgaged premises, the owner has a right to do so. In Levin v. Goldberg, 255 Ill. App. 62, it is said: "Until the mortgagee takes possession or procures the appointment of a Receiver, he has no better claim to the rents than a stranger. Until he takes such action, the owner may permit any person whether duly authorized in writing or otherwise to collect the rents and retain from the amounts collected commissions and disbursements." In the instant case the plaintiff, at this time, was not in possession and a receiver was not appointed until the day the complaint was filed, which was May 15, 1936.

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plaintiff, at this time was not in [illegible] receiver was not
appointed until the day the complaint was filed, which was on [illegible] 1936.

We have not overlooked the case of Austin v. Bainter, 50 Ill. 308, to which counsel call our attention. In that case it appeared that Bainter instituted a suit to foreclose a mortgage given to Coulson to secure the payment of two notes, executed by the mortgagors to Coulson, who assigned one of the notes to Bainter, who had brought suit on the note he held. Bainter subsequently filed a bill to foreclose the mortgage and alleged that while the suit he brought to recover on the note was pending, he agreed with the makers thereof that if they would pay interest on the balance remaining unpaid upon his note at 10% interest instead of 6% as provided in the note and reduce the amount due at certain specified dates, that then he would not prosecute his suit on the note. The makers agreed to do so. In holding the agreement enforcible, the court said: "A reference to the agreement will show that plaintiffs in error were to pay to defendant in error ten per cent on the balance of the debt then unpaid, until the debt should be satisfied, and defendant in error agreed to extend the time of payment as therein specified. * * * The debt was due and the agreement to forbear its collection and to give further time for payment, was a sufficient consideration to support the agreement, and it must be enforced". There is no doubt about this being the law but the facts in the instant case make it inapplicable.

It is finally insisted by appellant that the Chancellor erred in denying appellant's motion to amend his complaint by striking out the paragraph thereof which alleged the contract or agreement between appellant and the Pilgrim Company upon which appellant predicated his claim for an accounting. The written motion of appellant for leave to so amend and to dismiss his suit as to F. C. Pilgrim and Company was filed on August 11, 1938, long after the master had concluded the taking of the testimony and after he had overruled appellant's objections to his report. His motion for leave to amend and to dismiss the suit

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[illegible] in denying [illegible]

[illegible] the paragraph [illegible]

[illegible] appellant and [illegible]

[illegible] claim for an accounting. [illegible]

[illegible] to amend and to dismiss the [illegible]

filed on August 11, 1909, [illegible]

taking of the testimony and [illegible] overruled [illegible] objections

to his report. His motion for [illegible] to amend and to dismiss the suit

[illegible]

as to the F. C. Pilgrim Company was heard on August 18, 1938, at which time appellant's exceptions to the master's report were heard. At the conclusion of the hearing, the motion to amend and to dismiss the suit as to F. C. Pilgrim and Company were denied and the exceptions to the master's report were overruled and the court announced its holdings. The general rule is that a plaintiff may dismiss his complaint at any time before decree unless a counter-claim has been filed and the courts are always liberal in permitting amendments. Sec. 46 of the Civil Practice Act provides that at any time before final judgment, amendments may be allowed on such terms as are just and reasonable, introducing any new party or discontinuing as to any plaintiff or defendant. Sec. 52 of the same Act provides that after the hearing begins, the plaintiff may dismiss his action or any part thereof as to a defendant without prejudice, only on the order of the Court made on special motion, in which the ground for such dismissal shall be set forth and which shall be supported by affidavit. In the instant case the motion set forth that the plaintiff had misconceived his remedy and chosen the wrong forum, that the matter sought to be stricken had been improperly included and tended to confuse the issues, that no appeal could be taken from an adverse decision without causing long delay, that there had been no final hearing and defendant would not be prejudiced by such dismissal. The original complaint filed by appellant contained the paragraph sought to be stricken and made the F. C. Pilgrim and Company a defendant. The Pilgrim Company answered, there had been a full hearing before the master and the cause had been set down for final disposition before the Chancellor upon appellants' exceptions to the master's report. The motion does not state that appellant was not permitted to introduce any evidence which he desired or that he was deprived of the benefit of any available testimony. In our opinion none of the reasons set up in the motion would have warranted a dismissal of this suit without prejudice as to the F. C. Pilgrim and Company or would have

justified the Chancellor in permitting the amendment to be made which would have eliminated that part of the complaint which, with the answer thereto, made the only controverted issue in the case.

In this state of the record the Chancellor, in denying plaintiff's motion to amend and dismiss as to the F. C. Pilgrim and Company without prejudice, did not abuse his discretion. The decree appealed from will be affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9036

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG 3 - 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9436 Agenda No. 11

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Frank Seger,

Appellant,

vs.

John Pollard, Leonard Stropes, and Earl B. George, Commissioners of Meredosia Levee and Drainage District of Whiteside and Rock Island Counties in the State of Illinois,

Appellees.

Appeal from the Circuit Court of Whiteside County

DOVE, P. J.

The defendant Drainage District was organized more than thirty years ago under the Act of 1879 and contains more than eleven thousand acres of land in Whiteside and Rock Island Counties. The main ditch and six laterals aggregate more than sixteen miles in length and vary in depth from two to six feet and from six to thirty feet in width. The district owns and operates a pumping plant and also a dredge and within its boundaries there are approximately three miles of levees. On July 1, 1937, a decree for assessment of annual benefits of the district was entered by the County Court of Whiteside County. This decree finds $520.00 to be the reasonable estimate for repair of the levees and ditches for the ensuing year and that a reasonable estimate of the cost of operating and pumping plant and dredge, including employment of necessary help and purchase of fuel, oils and repairs to be the sum of $3,655.00 and renders judgment for $6400.00 in favor of the district and against the lands of the dictrict and directs that said judgment should be a lien upon the lands of the district until paid.

On March 16, 1936 the commissioners filed their petition in the County Court of Whiteside County for an order authorizing them to purchase a dredge. The petition alleges that the commissioners could

Gen. No. 8486

In the [illegible]

[illegible]

Frank Eager,

[illegible]

vs.

John Doler, [illegible]
and Earl [illegible]
of Meredosia Levee
District [illegible]
Island [illegible]
Illinois,

[illegible]

NOW, [illegible]

[illegible]

years [illegible]
acres of land [illegible]
and six hundred [illegible]
in depth from [illegible]
The [illegible]
within the [illegible]
on July 1, 1[illegible]
district [illegible]
degree [illegible]
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of the body of [illegible]
employment of [illegible]
to be the sum of $[illegible] [illegible]
of the district [illegible]
said judgment should [illegible] until
paid.

On March 10, 1906 the [illegible] filed their petition in the County Court of Whiteside County for [illegible] order authorizing them to purchase a dredge. The petition alleged that the commissioners could

purchase a suitable dredge for $5200.00 payable $1,000.00 cash and balance in payments and recites that if the dictrict did own a dredge all the ditches in the district could be kept claan and free from obstructions at all times with little, if any, additional expense, except for oils, fuels and other maintenance expenses and that such expenses would not exceed the sum of $500.00 per year. On April 6, 1936 the County Court entered an order upon this petition which, among other things found, that the ditches of the district are being constantly filled with dirt and debris, that every eight or ten years it has been necessary to contract the cleaning of the ditches and for that purpose the district expended $10,000.00 to $15,000.00, that the district owns and operates a pumping plant and that it is necessary to employ an engineer to operate the plant by the year. That in operating the pumping plant, the engineer is only so employed about fifty per cent of the time and during the remainder of the time could be advantageously employed by the district to operate the dredge. The order authorized the commissioners to purchase the dredge for not to exceed $5200.00 and directed that the dredge, when purchased, be used by the commissioners to clean out, build and dig drainage ditches and maintain and construct levees and dikes.

On July 1, 1938 the annual report of the commissioners covering the period from July 1, 1937 to June 30th, 1938 was filed in the County Court. By this report the commissioners charged themselves with the receipt of $13,283.68 and took credit for the disbursement of $12,304.60. To this report appellant filed certain objections which were heard and overruled by the County Court and the report approved. Upon appeal to the Circuit Court a hearing was had before the court and a jury, resulting ina finding by the jury against the objector. Upon this finding a judgment was rendered against the objector for costs and this appeal follows.

It was contended by the objector below, appellant here, that the commissioners, without authority or order of court, used

purchase a [illegible]
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employed by [illegible]
the [illegible]
[illegible]
to [illegible]
levees and [illegible].

In July, [illegible]
the period from [illegible]
Court. By [illegible]
receipt of [illegible]
$15,504.50. [illegible]
were heard and [illegible]
Upon appeal to the [illegible]
and a jury, resulting in [illegible]
Upon this finding a judgment was rendered against the objector for costs and this appeal follows.

It was contended by the objector below, appellant here, that the commissioners, without authority or order of court, used

the dredge for digging a new ditch during the fall of 1937, over and across the lands of D. F. Ossian and Claire V. Golden. That all expenditures with reference to the operation of the dredge, including fuel, repairs and labor, were illegal and that the charges made by the commissioners Pollard and Stropes for services rendered by them in procuring releases of right-of-way over the Ossian and Golden lands for the construction of this new ditch and their charges for mileage and for services by them in supervising the work on the new ditch with the dredge were never authorized by any court and are therefore improper.

Counsel for appellees contend that the order of the County Court entered on April 6, 1936 not only authorized the commissioners to purchase a dredge but to use it for digging this lateral over the Ossian-Golden lands, and call our attention to the annual benefit levy made on July 1, 1937 and insist that the commissioners had the legal right, when the money under this levy came into their hands, to expend it for the construction of this ditch by virtue of Section 37 of the Levee and Drainage Act, Ill. Bar Stat. Chap. 42.

Section 37, Chap. 42, Ill. Rev. Stat. 1937, among other things, provides: "Said commissioners may use money arising from the collection of assessments or coming into their hands, as such commissioners, * * * for the purpose of constructing or repairing or maintaining any ditch, ditches, drains, levee or levees within said district or outside of said district, necessary to the protection of the lands and complete drainage of the same within said districts; provided, that the commissioners shall use such money under the direction or approval of the Court." The evidence is that in August, 1937 the commissioners started work on the ditch referred to in this record as the Ossian-Golden ditch. It started in at the upper end of what is spoken of in the record as the old Dosia Slough, which is located in the northeast quarter of the southeast quarter of Section 35 in Township 20 in

the dredge for dig[illegible]
and across the [illegible]
all expend[illegible]
including that, [illegible]
made by the co[illegible]
by them in [illegible]
follow [illegible]
for mil[illegible]
new ditch [illegible]
are short[illegible]
[illegible]
Court [illegible]
to pure[illegible]
the de[illegible]
benefit [illegible]
had the [illegible]
hands, to [illegible]
section of [illegible]
[illegible]
provide[illegible]
of assessments or [illegible]
for the pur[illegible]
ditches, drains, [illegible]
said district, [illegible]
drainage of the same [illegible]
misdoners shall use [illegible]
the Court." The evidence [illegible]
started work on the ditch [illegible]
Golden ditch. It started in [illegible] the upper [illegible] of which is [illegible]
in the record as the old Basin Slough, which is located in the north-
east quarter of the southeast quarter of Section 33 in Township 20 in

Rock Island County. This Ossian-Golden ditch then followed the channel of this slough west according to the testimony of commissioner Pollard for one-half a mile and according to the testimony of Commissioner Stropes for a quarter of a mile. It then turned south to the highway. Its entire length was a little over one mile and its average depth was five feet, and it was about five feet wide at the bottom and eight or nine feet in width at the top. The district had never dug a ditch before through the Ossian-Golden lands, and no ditch had ever been dug or maintained through the slough, but there was a shallow plow ditch from the highway to the slough with which the District had had nothing to do. Stropes testified that the dredge was used on this new lateral for approximately three mohths and that the commissioners had used the dredge to clean out about six miles of the main ditch during the time the district owned the dredge and besides digging the Ossian-Golden lateral had used the dredge to clean out about one-half mile of the main ditch during the period covered by the report to which appellant had objected. According to the testimony of commissioner Stropes, 13,000 yards of dirt were moved in constructing this lateral and in cleaning out the main ditch some 20,000 yards of dirt were removed during the period covered by their report, that is, from July 1, 1937 to July 1, 1938. None of the witnesses were able to state the amount expended for fuel or for labor or for repairs upon the dredge occasioned by the work in digging this lateral. In commissioner Pollard's statement for his services and expenses, which accompanied the report of the commissioners, are several items in which he makes charges in connection with securing releases of right-of-way from D. G. Ossian and Claire V. Golden and in this statement the lateral in question is referred to twice as a "new ditch".

The only conclusion that can be drawn from all the evidence in this record is that the Ossian-Golden lateral is an entirely new

Rock Island Journey. [illegible]
of this slough [illegible]
for one-half [illegible]
stopped for [illegible]
its entire length [illegible]
was five feet, [illegible]
eight or nine [illegible]
a [illegible]
been dig[illegible]
pile from [illegible]
be [illegible]
this [illegible]
on the [illegible]
surface [illegible]
Geologists [illegible]
like [illegible]
applicant [illegible]
europea [illegible]
and in [illegible]
[illegible]
July 1, [illegible]
where the [illegible]
the [illegible]
commissioner [illegible]
accompanied the report of [illegible]
which he makes [illegible]
of-way from [illegible]
the lateral in question is referred to [illegible]

The only complaint that can be heard from all this evidence in this record is that the Ocalan-Dolhier lateral is an entirely new

ditch so far as this drainage district is concerned and Section 37 of the Act under which this district was organized gave the commissioners authority to construct it, providing they did so under the direction or approval of the County Court. Appellees argue that this work was done under the direction and with the approval of the County Court and that in constructing this lateral they acted under the order of April 6,1936. This order, among other things, found that the cleaning out of the ditches of the district necessitated an expenditure of from $10,000.00 to $15,000.00 every eight or ten years, that it would be advantageous to the district to purchase a dredge to do this work and authorized the commissioners to expend not to exceed $5200.00 for a dredge to be used by the commissioners for cleaning out, building and digging drainage ditches and maintaining and constructing levees and dikes. There is nothing in this order authorizing or directing the commissioners to dig this Ossian-Golden lateral, nor can it be successfully urged that that which they did was done with the approval of the County Court because of anything appearing in the order of July 1, 1937.

It is true that the construction of this lateral is beneficial to some of the land lying within the district. Whether the County Court would or would not have been justified in authorizing the expenditure of the moneys which came into the hands of the commissioners for the construction of this lateral does not arise upon this record. The direction or approval of the court referred to in the statute means, in our opinion, the direction or approval of the court prior to the time the construction of new work is undertaken. Not having done so, the objections of the appellant should be sustained as to the amount expended by the commissioners in digging this lateral and in procuring right-of-way releases from Messrs. Ossian and Golden.

The judgment of the Circuit Court of Whiteside County is reversed and this cause is remanded to the County Court of that county

ditch so far as [illegible]

of the act under which [illegible]

authority be somewhat [illegible]

approval of [illegible]

under the [illegible]

in constructing [illegible]

This order, [illegible]

citizens of the [illegible]

be 10,000.00 acre [illegible]

[illegible]

[illegible]

by the [illegible]

ditches and [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

to some of [illegible]

court could or [illegible]

time of the [illegible]

the construction [illegible]

direction or appeal [illegible]

in our opinion, [illegible]

time the construction [illegible]

the objections of the [illegible]

expended by the commissioners in [illegible]

right-of-way release from [illegible]

The judgment of the Circuit Court of [illegible] County is reversed and this cause is remanded to the County Court of said county

with directions to vacate the order overruling appellant's objections to this report and to vacate the order approving the same and to direct the commissioners to recast their report so that it will disclose substantially the amount expended by the commissioners in digging this Ossian-Golden lateral and in procuring right-of-way releases therefor and for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG 3 - 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9400 Agenda No. 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939

Russell Wayne Green and
W. J. Bennett,

Appellants,

vs.

Paul Sartwell and Leon
Sartwell,

Appellees.

Appeal from Circuit Court

Carroll County.

HUFFMAN - J.

This suit was commenced against appellees in a Justice of the Peace court. Appeal was taken from that court to the Circuit Court of Carroll county, where the case was tried before the court without jury. Judgment was entered in favor of the defendant appellees. This appeal is prosecuted from such judgment.

It appears that on the night of April 10, 1938, appellant Green was using a Model T Ford truck to move his household furniture from Savanna to Fulton. North of the village of Thomson, a passenger automobile then being operated by Paul Sartwell, appellee, collided with the rear end of the truck, causing the truck to turn over on the side of the road, with resulting injury to appellant Green's furniture and appellant Bennett's truck. Appellant Bennett was the uncle of appellant Green, and had loaned his nephew the truck for the purpose for which it was then being used. Clifford Bush was riding with appellant Green at the time of the accident.

It was claimed by Paul Sartwell, the driver of the passenger car, his wife, and by Mr. and Mrs. Miller, who were riding with appellee, that the truck had no tail light; that they were travelling at about forty-five miles per hour, and did not see the truck until too late to avoid the collision. The accident happened at about nine-thirty at night. The evidence of appellees is to the effect that as soon as

IN THE
[illegible]
[illegible]

[illegible]

Russell Wayne Green and
M. E. Hammett,

[illegible]

vs.

Paul [illegible]
Barth [illegible],

[illegible]

[illegible]

[illegible]

These cases [illegible]
of [illegible]
one [illegible] observed in [illegible]
[illegible]

[illegible]
was [illegible]
[illegible]
automobile [illegible]
[illegible]
side of the [illegible]
and appellant [illegible]
appellant [illegible]
for which [illegible]
appellant [illegible] the time of [illegible]

It was claimed by [illegible] that [illegible]
his wife, and by [illegible] that [illegible]
that the truck had no tail light; [illegible] was running as about
forty-five miles per hour, and did not [illegible] until too late
to avoid the collision. The accident happened at about nine-thirty
at night. The evidence of appellees is to the effect that as soon as

they saw the back end of the truck, the driver of the passenger car turned the same to the left as quickly as possible to avoid striking the truck; that the right front corner of the passenger car caught the left back corner of the truck.

It was the position of appellant Green and his witness Bush that the tail light was burning previously in the evening when they stopped at a filling station, and that they had no knowledge it was not burning at the time of the accident. There is evidence on the part of Mr. and Mrs. Lloyd Moore, who saw the truck shortly before the accident when they passed it in their car, that it did not have any tail light. To the same effect is the testimony of the witness Sweitzer.

Following the judgment of the court, affidavits were filed by appellant Green and his witness Bush, to reopen the case, set aside the judgment, and for retrial. There is nothing in those affidavits concerning any new matters. They also filed for the same purpose, the affidavit of Jacob Dornbush, operator of a garage in the city of Fulton. His affidavit is to the effect that following the accident, he went to the place in question, where he righted the Ford truck, reloaded the furniture, and brought the same to the city of Fulton. Nothing appears in this affidavit to disturb the judgment of the court.

The hearing in this case involved only questions of fact. The trial court saw and heard the witnesses testify, and this court is not justified in disturbing the judgment, unless it appears from the evidence that it is manifestly against the weight thereof. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG 2 - 1939, the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9406 Agenda No. 9.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939

Claudia V. Underwood,

Appellant

vs.

Appeal from Circuit Court
Woodford County.

Charles F. Coates,

Appellee.

HUFFMAN - J.

This was a suit by appellant to recover for personal injuries sustained by her in a collision between an automobile in which she was riding and the automobile of appellee. Appellant at the time was riding in her husband's car, which was being operated by her married daughter. The car in which she was riding collided with the rear end of appellee's automobile. Appellant was thrown against the windshield, breaking same, and sustained thereby a cut over the right eye, a displacement of the cartilage of the nose, a cut on the left upper lip, a cut on the left side of the nose, and bruises on her knees. The case was tried by jury, which returned a verdict for appellant in the sum of $300. Appellant filed a motion for a new trial, which was denied, and judgment was entered in favor of appellant upon the verdict. Appellant has prosecuted this appeal from such judgment, urging that the verdict is so grossly inadequate as to require granting a new trial.

The testimony of Dr. Riggert, a witness for appellant, sets out the injuries as above indicated. He states that the scars are nicely healed; that the right side of appellant's nose is obstructed by a displaced cartilage and that she can not breathe freely through the left nostril. The testimony of Dr. Slater, also a witness for appellant, indicates that both sides of appellant's nose are obstructed by displaced cartilage. Both doctors agree that this condition will remain unimproved and that to secure any relief therefrom appellant

will have to resort to surgery for the removal of sufficient cartilage from the nose to permit free passage of air in breathing. No proof was offered as to any medical expense in connection with the injuries received. It appears that appellant is living with her husband and is of rather advanced years.

This is a case in which the jury could well have awarded appellant more damages for her injuries. However, under the circumstances, this court is reluctant to say that the damages awarded are so grossly and clearly inadequate as to require a reversal and remanding of the case. Appellant objects to appellee's given instructions 3 and 4. Neither of these instructions went to the question of damages and had to do only with negligence. The jury resolved the question of negligence against the defendant appellee. Appellant can not be heard to complain in that regard. The jury also had opportunity to see and observe appellant during the process of the trial and as a witness. The court likewise had this opportunity. These matters were again considered by the court upon motion for a new trial. Under the record in the c ase, this court does not feel that the judgment should be disturbed.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

941

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG [illegible] 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9412 Agenda No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A.D. 1939.

A.M. Everhart,
Appellee

vs.

Town of Milford, a quasi-public
Corporation,

The Great Atlantic & Pacific
Tea Company, a Corporation,

Appellee

vs.

Town of Milford, a quasi-public
Corporation.
(S.O. Wright, et al.,

Appellants).

Appeal from Circuit Court

Iroquois County.

HUFFMAN - J.

Appellees A.M. Everhart and The Great Atlantic & Pacific Tea Company, brought suit against the town of Milford in Iroquois county. The suit of appellee Everhart was brought by him to recover for medical services alleged to have been furnished to paupers of said town at the request of its supervisor. The suit of appellee The Great Atlantic & Pacific Tea Company was brought by it to recover for goods and merchandise furnished to paupers of said town, at the request of its supervisor.

No answer or appearance was made on behalf of said town. After the return day had passed and the defendant town was in default, S.O. Wright, S.G. David, Jack Baker, Arnot Bailey, Joe Tilds and Sam Sloan, in the capacity of taxpayers and citizens of said town, filed a motion in each case for a jury trial and for a bill of particulars. The two cases were by order of court consolidated and the motions of appellants Wright, David, Baker, Bailey, Tilds and Sloan for jury trial and for a bill of particulars,

were denied. Whereupon, said named persons gave notice of appeal from the ruling of the court denying their motions, and this appeal follows.

No judgment appears in this case. The only ruling of the Court appearing of record with respect to appellants, is that denying their motions for bill of particulars and for trial by jury. For want of a judgment herein, the appeal is dismissed.

Appeal dismissed.

were denied. Thereupon, said [illegible] from the ruling of the court [illegible] appeal follows.

No judgment [illegible]

Court appearing of record [illegible] denying their motion [illegible] jury. [illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9438 Agenda No. 12

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1939

William W. Blomberg,
Appellant

vs.

Donald McDermaid,
Appellee.

Appeal from the Circuit Court
Winnebago County.

HUFFMAN - J.

This is a suit brought by appellant against appellee for damages sustained by reason of an assault and battery alleged by appellant to have been committed on him by appellee. At the close of all the evidence in the case, the court, on motion of defendant, directed a verdict, and appellant appeals from the judgment entered thereon.

Appellant and appellee lived next door to each other. On April 2nd, 1938, a surveyor was engaged in establishing the property line between their property. It appears that while appellant was standing near the front porch of his house, on the walk which led in from the street, appellee came to his premises in an excited state of mind. The two engaged in some conversation, whereupon an encounter of fisticuffs occurred, and this suit resulted. According to appellant, when he saw appellee coming, he started to mount his front steps, whereupon appellee also mounted the steps, shaking his fist in appellant's face, and appellant says, started to jump on him for interfering with the surveyor. Appellant says he denied that he had interferred with the property line as being established by the surveyor, and demanded that appellee get off his premises. Whereupon, appellant claims that appellee struck him some two dozen times or more, in and about the face; that he tried to get away from appellee and after the encounter, found himself in the bushes up against appellee's house. Appellant resorted to a physician and surgeon for treatment.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May 1 [illegible], A. D. 1[illegible]

William [illegible] Dickerson,

Appellant

v.

Donald [illegible],

Appellee.

[illegible] - [illegible].

[illegible] damages [illegible] appellant [illegible] of all the [illegible] discovered [illegible] unknown.

[illegible] April 3rd, 1[illegible], [illegible] line between [illegible] standing [illegible] in front [illegible] state of mind [illegible] encounter [illegible] to appellee [illegible] front [illegible] fist in [illegible] him for life [illegible] that he had interfered [illegible] by the driver, and [illegible]. Whereupon, appellant claims [illegible] on the [illegible] times or more, in and about the face; [illegible] from appellee and after the encounter, found himself in the [illegible] against appellee's house. Appellant resorted to a physician and surgeon for treatment.

It appears that appellee returned home at the time in question, in answer to a phone call from his wife, from whom he received information that appellant had been tampering with the stakes the surveyor had set in establishing the property line. Appellee went over to appellant's property for the alleged purpose of discussing the matter relative to appellant's tampering with the stakes, at which time appellee says appellant said to him, "nuts, to you, you son of a bitch," following which incident the altercation took place. Appellee claims to have been the one who received the most blows, and claims that after the fight stopped, appellant returned to his own yard and there swore at him.

The only question in this case is whether the court committed error in directing the jury to find the defendant not guilty, thus taking away from plaintiff the right to have the jury pass upon the disputed questions of fact as between the plaintiff and defendant. Like every other encounter of this nature and character, there is a wide discrepancy in the testimony of the parties in interest, as to what precipitated the altercation, who was the agressor, with each party seeking to place the blame on the other.

Our conclusion is, that the case should have been submitted to the jury, and that the trial court erred in directing a verdict for the defendant. The judgment is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9451

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

301 I.A. 621 2

BE IT REMEMBERED, that afterwards, to-wit: On AUG [illegible] 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9451 Agenda No. 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1939

Cecil Conn, Administrator of the Estate of Ronald Conn, deceased,

Appellant

vs.

Cooperative trading Company, a Corporation, and Joseph A. Grum,

Appellees.

Appeal from Circuit Court Lake County.

HUFFMAN - J.

This was a suit by appellant administrator to recover damages for the alleged wrongful death of Ronald Conn, an infant of fourteen months. Briefly stated, the facts are as follows: Appellee company was engaged in the dairy business in the city of North Chicago. Appellee Grum was a driver of one of its milk trucks, making delivery to its customers. The family of the deceased child lived on the outskirts of the above city and just beyond the city limits. They lived on what is known as Stewart Avenue, which is a street running in a general north and south direction. On May 22, 1938, at about nine o'clock in the morning, the driver of the milk truck stopped the truck on the west side of Stewart Avenue at about a forty-five degree angle, and toward the south. He, at this time, left the truck with three quarts of milk for the purpose of making deliveries to customers located at and near this place. Following delivery of the milk, he returned to his truck, backed the same north on Stewart Avenue for a distance of three or four feet and then proceeded forward on Stewart Avenue toward the south.

He was called as a witness for appellant, under Sec. 60, and examined with reference to the occurrence. He states that the delivery of the milk took about one and one-half minutes of time; that while the delivery was being made, the engine was left running;

IN THE
[illegible]
[illegible]
[illegible]

[illegible]

Cecil Cohen, [illegible]
Estate of Max [illegible], deceased, [illegible]

[illegible]

vs.

Cooperative [illegible]
Gordon Blok, [illegible]

[illegible]

BULLETIN - 6.

[illegible]

for [illegible]
team north, [illegible]
company was [illegible]
Chicago. [illegible]
[illegible] features, [illegible]
lived on the [illegible]
Lincoln. [illegible]
street [illegible]
[illegible], [illegible]
truck [illegible]
a four-[illegible]
left the [illegible]
deliveries [illegible]
delivery of the milk, [illegible]
north on Stewart [illegible]
then proceeded forward [illegible]

He was called as a witness for [illegible], driver [illegible], and examined with reference to the occurrence. He stated that the delivery of the milk took about one and one-half minutes of time; that while the delivery was being made, the engine was left running;

that upon return to the truck, he looked to see if there was anyone back of the truck, and seeing the way unobstructed, entered the truck, backed the same, and proceeded south on Stewart Avenue. He states that he saw no child at or near the truck, and that the only children he saw were some colored children playing with two or three white children in the yard of the premises occupied by the Link family, which was north of the truck. There were no eye witnesses to the accident. It appears that the deceased must have crawled under the truck while it was parked, because after the truck drove away, the child was found lying on the ground where the truck had been standing during the delivery of the milk. It is apparent that one of the wheels of the truck must have passed over the baby's body, causing its death.

Appellant's witness, Charlie Ball, appears from the evidence to have been the first person to see the child after the accident. The day in question was on Sunday. He states that he was sitting on the front porch of his house at about nine o'clock that morning, and saw the truck in question drive up and stop at the west edge of Stewart Avenue with the front portion turned into a driveway. He states that he saw the driver leave the truck with milk for delivery; that the engine was left running and that the truck was parked approximately thirty feet from where this witness was sitting; that he saw the truck come down on Stewart Avenue toward the south before it was parked; that he saw it turn toward the west from Stewart Avenue into the driveway; that he saw the driver leave the truck with the milk and go to the rear of the houses; that he saw him return with empty bottles, enter the truck, back it into Stewart Avenue a sufficient distance in order to permit the driver to proceed south on this street, but that he thinks it took longer than one and one-half minutes to make the delivery of the milk. He says that during all this time he was sitting in a chair on his porch and looking at the truck; that he did not see the child at any time until after the truck had backed into Stewart Avenue and was proceeding south thereon, when he saw the child lying in the driveway where the truck had been parked. He says

that upon reaching to the [illegible] one back of his truck, [illegible] truck, backed the [illegible] states that he saw [illegible] children in a [illegible] wife/ children [illegible] family, who [illegible] the roadbed. [illegible] the truck [illegible] radio [illegible] grass [illegible] of the [illegible] [illegible] come [illegible] that [illegible] very [illegible] the road [illegible] rather [illegible] order to [illegible] he turned in [illegible] delivery of the mail. [illegible] ting in a chair on [illegible] not see the child at [illegible] Stewart Avenue and was proceeding [illegible] child lying in the driveway where the truck [illegible] [illegible]

that he does not think he ever saw this baby before and that upon seeing it lying in the driveway, he called to Charlie Grim and they ~~went~~ went out to where the child was lying. He further states that he did not see the truck back over the child, and that he does not know where the child was before the accident. After the accident the parents of the baby were notified, and several people living in the vicinity came to the scene of the accident. The driver of the truck did not know anything about the accident until about an hour and twenty minutes later, when he was advised by the police, while still making deliveries of milk. The driver fixes the distance from where he parked his truck to where he saw the children playing on the morning in question, at more than one hundred feet. He states that he saw no child at or near the truck or near the driveway where he stopped the truck, at any time.

The witnesses for plaintiff consisted of Charlie Ball, whose testimony has been referred to; Cecil Conn, appellant (father of deceased), who was not at home on the day of the accident; Marion Conn, mother of deceased, who was busy in the kitchen of the home at the time of the accident; appellee Grum, who testified concerning his movements and operation of the truck; and Dr. Barnes, who testified concerning the cause of death.

Appellee's made motion for directed verdict at the close of appellant's evidence and again at the close of all the evidence. Ruling upon these motions was reserved by the court. The case was submitted to the jury and they found for plaintiff appellant in the sum of $750. Appellees then filed a motion for judgment notwithstanding the verdict. This motion was allowed and judgment was entered by the court for appellees non obstante veredicto. Appellant has prosecuted this appeal from the above action of the trial court.

Three ladies living in the neighborhood of the Conn residence, testified that they knew the family; knew the deceased child; and that on numerous occasions they had seen the child playing with

that he does not think he ever saw this baby before [illegible] upon seeing it lying in the driveway, [illegible] went out to where the child [illegible]. [illegible] he did not see the [illegible] know where the child was [illegible] the parents of the [illegible] in the vicinity [illegible] the truck did not [illegible] hour and [illegible] while [illegible] tance from [illegible] playing [illegible] he knows [illegible] driveway [illegible]

The [illegible] testimony [illegible] doesn't [illegible] Corn, [illegible] at the time [illegible] his [illegible] testified [illegible]

Appellant's [illegible] appellant's [illegible] Ruling upon [illegible] submitted to [illegible] the sum of [illegible] withstanding the verdict. [illegible] was entered by the court [illegible] Appellant has presented [illegible] the trial court.

Three ladies living in the neighborhood of the Corn family, testified that they knew the family; knew the deceased child; and that on numerous occasions they had seen the child playing with

his brothers and sisters and with other children in the neighborhood in and about an old automobile that stood in a lot adjacent to the Conn residence.

Before recovery can be had in actions for wrongful death, there must be some evidence or circumstances in evidence, tending to prove negligence on the part of the defendant. In this case there is a total lack of such proof. Appellant's witness Ball who states that he saw the truck drive up to the place in question and stop, and who watched it during the entire time until the driver returned, backed it into Stewart Avenue and started south thereon, states that at no time did he see the child until after the truck had backed into the street and started south. There is no dispute in the evidence. Due to an absence of evidence tending to prove negligence on the part of appellees, the court properly granted the motion for judgment notwithstanding the verdict.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

9454

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG 31 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9454 Agenda No. 24.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1939

Otto Pohl, Administrator of
the Estate of Evelyn Pohl,
deceased,

Appellant

vs.

Appeal from Circuit Court,
Winnebago County.

Adam Fazzi,

Appellee.

HUFFMAN, J.

This is a suit by appellant to recover damages for the next of kin, under the Injuries Act, because of the alleged wrongful death of Evelyn Pohl, appellant's intestate.

The defendant below, made motion at the close of plaintiff's evidence and again at the close of all the evidence, for a directed verdict. These motions were denied. The jury returned a verdict for appellant in the sum of $5,750, whereupon appellee filed a motion for judgment notwithstanding the verdict, which motion was granted. This appeal is prosecuted by the plaintiff administrator to reverse the judgment of the trial court entered for the defendant notwithstanding the verdict.

The deceased was a girl twelve years of age, living with her family, on the outskirts of the city of Rockford, Illinois. State highway No. 2 runs in a north and south direction close to where the deceased lived. The highway is an ordinary concrete highway, eighteen feet in width, with the customary black line down the center dividing it into proper lanes of traffic. The Pohl residence was located in what is known as Indian Village Subdivision, which lay adjacent to the highway. The mail box of the Pohl family was located along the west side of the highway and about seven feet from the west edge of the pavement. The deceased, on the morning of June 19, 1937, at approximately nine-thirty o'clock, was at the family mail box on the

west side of the highway. At this time, Myron Worthington was approaching in his car, from the north. He was a member of the firm of Worthington & Condon, engaged in the sale of farm machinery and equipment. With him was riding Stephen F. Long, a salesman for the International Harvester Company. The day was clear, the pavement dry, the highway straight and level, and the view unobstructed. As Mr. Worthington was approaching the place in question, he saw the deceased standing at the mail box when he was about three hundred fifty to four hundred feet north thereof. He was then travelling about forty miles an hour. When he saw the girl, he observed that she was starting to walk across the pavement toward the east, which was toward her home. He states that he could see she was watching the approach of his car as she started to walk across the highway, that he took his foot off the throttle, or gas feed, and permitted his car to slow down. He also saw the defendant approaching from the south in his automobile. He states there was no other automobile or obstruction between the defendant's car and the deceased; that the deceased walked to the center line of the pavement, looked toward the south, the direction from which the defendant was approaching, and then started running directly east across the east traffic lane of the pavement; that the defendant gave no signal or warning of his approach; that he could detect no change in the speed of defendant's automobile; that the defendant continued in his course northward, turning his automobile to the right before reaching the path of the deceased, driving his car off the east edge of the pavement and struck the deceased at a point on the shoulder of the road, about two feet from the east edge of the pavement, with the left front fender of his automobile, throwing her into the air at least ten feet.

The defendant's car after striking the deceased continued on north for approximately fifty feet, where it struck a telephone pole, breaking off same. The body of the deceased was found lying about thirty feet north of the telephone pole. The witness Worthington states that he had been driving an automobile since 1912; that he had had occasion to estimate the speed of automobiles, and that in his

west side of the highway. At [illegible] was approaching in his car, [illegible] firm of Worthington [illegible] and equipment. [illegible] the intersection [illegible] ment [illegible] deceased standing [illegible] fifty to [illegible] about forty [illegible] the south [illegible] turning his automobile [illegible] deceased, [illegible] struck the deceased [illegible] two feet from [illegible] fender of his automobile, [illegible] feet.

The defendant's [illegible] north for approximately fifty feet, [illegible] pole, breaking off same. The body of the deceased [illegible] about thirty feet north of the telephone pole. The witness Worthington states that he had been driving an automobile since 1912; that he had had occasion to estimate the speed of automobiles, and that in his

opinion the defendant's car was going between forty and fifty-five miles per hour after it left the pavement, before striking the deceased. The evidence of the witness Long, who was riding with the witness Worthington, is in accord therewith. Some eight or ten other witnesses testified for the plaintiff below. However, there were no eye witnesses to the accident who testified other than Worthington and Long. The testimony of plaintiff's additional witnesses was directed toward the conditions following the accident, such as the location of defendant's car, the telephone pole, and other physical facts.

Clarence Read, a police officer of the city of Rockford, and Harvey Crandell, a deputy sheriff, testified for defendant appellee, as to the physical surroundings connected with the accident after its occurrence and after they had been called to the scene. The testimony of one James Callahan, as given in a former trial, was read to the jury on behalf of defendant, by agreement of the parties. On the morning in question, this witness was driving a truck and following behind the witness Worthington's car a distance of from one hundred to two hundred feet. He states that when he first saw the deceased, she was in the middle of the pavement. He says he did not pay much attention to her. He further states that she started to run toward the east side of the road, and was struck by defendant's car. He says that he saw the defendant's car approaching from the south at the time the girl started to run across the east half of the pavement, and that the defendant was then a block or two south of her, and that he considers a block to be from eighty to one hundred feet. Following the accident, he stopped his truck and helped the defendant out of his automobile. This is the extent of this witness's testimony.

The question of negligence on the part of a defendant and of contributory negligence on the part of a plaintiff, are questions of fact, the determination of which in the first instance, properly rests with the jury. When the case is being tried by jury, the court

can not weigh the evidence of a plaintiff and defendant in order to determine where, in its opinion, the preponderance lies. And if after verdict the trial court is dissatisfied with the finding of the jury upon questions of fact, it should grant a new trial rather than enter judgment non obstante veredicto. Under such circumstances, the question the court has to determine is, whether there is any evidence in the record which, if true, tends to prove the plaintiff's cause of action. Under such circumstances, the court can not weigh the evidence of the one party as against that of the other.

From an examination of the record, we are of the opinion the trial court erred in granting appellee's motion for judgment non obstante veredicto.

The judgment herein is reversed and this cause remanded with directions that the trial court shall overrule the defendant's motion for judgment notwithstanding the verdict and for such other proceedings as may by law appertain.

Reversed and r emanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

9 v 2/.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9421 Ag. No. 4

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FEBRUARY TERM, A. D. 1939

General Motors Acceptance Corporation, a corporation,

Appellant

vs.

Herman Goldstein,

Appellee.

Appeal from Circuit Court, Rock Island County.

WOLFE, J.

This is an appeal from a judgment of the Circuit Court of Rock Island County, entered in favor of the defendant, Herman Goldstein, and against the plaintiff, General Motors Acceptance Corporation, in an action of replevin for three automobiles.

The complaint filed, alleged that plaintiff was the owner of said automobiles by payment of the wholesale price thereof, and through three certain bills of sale dated May 24, 27 and 28, 1937, respectively, conveying title to said automobiles from General Motors Sales Corporation, Oldsmobile Division to the plaintiff; that contemporaneous with a delivery of title to said automobiles to the plaintiff by said bills of sale, the plaintiff, as Entruster, caused possession of said automobiles to be delivered to Mathey Sales Company, as trustee, under and pursuant to the terms of three trust receipts, executed pursuant to the Uniform Trust Receipts Act of Illinois. Mathey Sales Company was a retailed dealer in Oldsmobile automobiles at Galena, Illinois. It is further alleged that Mathey did not pay for, or obtain title to said automobiles.

The defendant at the time the action was begun, also claimed title and right to the possession of the cars by three alleged bills of sale issued by Mathey Sales Company to Moline Used Car Exchange dated June 4, and 10, 1937. He asserts that he bought the three cars as agent for the Moline Used Car Exchange and was both a buyer in the

[illegible]

[illegible]

General Motors [illegible]
Corporation, a [illegible]

[illegible]

vs.

Herman [illegible]

[illegible]

WHEREAS, [illegible]

[illegible]

Inferred [illegible]

and [illegible]

[illegible]

The [illegible]

said [illegible]

through [illegible]

respective [illegible]

[illegible]

temporarily [illegible]

plaintiff by [illegible]

possession [illegible]

as [illegible]

accepted [illegible]

Matney Sales [illegible]

at Galena, Illinois. [illegible]

for, or obtain title [illegible]

The defendant [illegible]

title and right to the possession [illegible]

of sale issued by Matney Sales [illegible] to Moline [illegible]

dated June 4, and 10, 1927. He asserts that he bought the truck and

as agent for the Moline Used Car Exchange and was both a buyer in the

ordinary course of trade under the Uniform Sales Act and an innocent purchaser in good faith and for value. This is the issue to be decided in this appeal.

On June 24, 1937, the plaintiff sued out its writ of replevin for the recovery of said automobiles and caused the same to be seized by the Sheriff of Rock Island County from the custody and control of the defendant at the premises of the Moline Used Car Exchange at Moline, Illinois. The case was tried before a jury. At the close of all of the evidence, the court directed the jury to return a verdict for the defendant and to find that the defendant was entitled to the return of the property. The jury so found and the plaintiff entered its motion for a new trial. This motion was overruled and judgment was entered upon the verdict of the jury and the plaintiff prosecutes this appeal.

The appellant insists that the issues shown by the pleadings, are: First, that having paid for and obtained bills of sale to the automobiles, and having complied with the Uniform Trust Receipts Act of Illinois and being the owner of valid trust receipts covering the three automobiles, is the plaintiff entitled to recover possession of them from this defendant?

Second, did the defendant, as agent for the Moline Used Car Exchange, acquire the three automobiles as a "buyer in the ordinary course of trade," under Sections 9 (21) and 1 (1) of the Uniform Trust Receipts Act of Illinois. (Ill. Rev. Stat. 1937, Chap. 121½, Section 174 (21) and Section 167 (1) and thereby defeat the title and right to possession of the plaintiff?

Third, were the transactions between the defendant and Mathey Sales Company "sales by trustee in the ordinary course of trade," under Section 9 (2a) of the Uniform Trust Receipts Act of Illinois (Ill.Rev. Stat. 1937, Chap. 121½, Par. 174 (2a)).

Fourth, did the defendant, as agent for the Moline Used Car Exchange, acquire the three automobiles as an innocent purchaser in good faith and for value, free from the title and right of possession of the plaintiff?

The appellee in his Brief, states "the only issue on this appeal is whether the defendant at the time of the purchase of the three automobiles,

[illegible] ordinary course of trade under the [illegible]
purchaser in good faith [illegible]
in this appeal.

On June 24, 1927, [illegible]
the recovery of [illegible]
the Sheriff of [illegible]
defendant at the [illegible]
Illinois. The [illegible]
the evidence, [illegible]
defendant [illegible]
the property. [illegible]
for a new trial. [illegible]
upon the [illegible]
[illegible]
First, [illegible]
and [illegible]
being the [illegible]
in the [illegible]
Second, [illegible]
acquire the [illegible]
trade, [illegible]
Act of Illinois. [illegible]
and Section [illegible]
of the plaintiff?

Third, were the [illegible]
Sales Company [illegible]
Section 9 (3a) of the [illegible]
Stat. 1927, Chap. [illegible]

Fourth, did the [illegible]
acquire the three automobiles [illegible]
and for value, free from the title [illegible] of the plaintiff?

The appellee in his Brief, states the [illegible] issue on this appeal is whether the defendant at the time of the purchase of the three automobiles,

was protected as a buyer in the ordinary course of trade, under the provisions of the Uniform Trust Receipts Act and that there is no issue as to whether the defendant was an innocent purchaser in good faith and for value." We cannot agree with the appellee's contention that there is no issue as to whether the defendant was an innocent purchaser in good faith and for value, involved in this suit. An examination of the pleadings in this case discloses that the answer of defendant Par. 5, alleges that the Mathey Sales Company was given permission by the General Motors Acceptance Corporation to sell said motor vehicles in the ordinary course of trade to innocent purchasers for value. In Par. 15, it is alleged that the defendant at thesaid time of the purchase of said motor vehicles, he individually and as agent for the Moline Used Car Exchange was a purchaser in the ordinary course of trade and for valuable consideration and without knowledge or understanding of the terms of the General Trust Receipts of the General Motors Corporation purchasing said automobiles. Evidence was introduced tending to show the contention of both appellant and appellee.

Under the pleading and the evidence as disclosed by the record, it is our conclusion that a question of fact was raised which should have been submitted to the jury for their determination. In the case of Montgomery Ward Company vs. Roeder, 217 Appellate 89; National Cash Register Company vs. Wait, 158, Appellate 168. One of the latest expressions of our Supreme Court is in Ginsberg v. Ginsberg, 361 Ill., 499 at page 508, it is said, "The appellant's contention contains the added objection that the trial court was not authorized or empowered to direct a verdict at the close of the evidence offered by a contestant. A motion to direct a verdict in a will contest has been held to be governed by the same rules as govern such motions made in actions at law. (Brownlie v. Brownlie, 351 Ill., 72, 78; McCune v. Reynolds, 288 id. 188, 190.) The party resisting such a motion is entitled to the benefit of all the evidence, considered in its aspect most favorable to him, together with all reasonable presumptions to be drawn therefrom. The motion raises the question whether there is any evidence fairly tending to prove the allegations of the bill. If such evidence

was protected as a buyer in the ordinary course of trade, under the provisions of the Uniform Trust Receipts Act [illegible] issue as to whether the defendant [illegible] faith and for value." [illegible] that there is no issue [illegible] purchaser in good faith [illegible] examination of the [illegible] of defendant [illegible] persuasion by the [illegible] motor vehicles in [illegible] for value. In fact, [illegible] time of the purchase [illegible] agent for [illegible] course of trade [illegible] or unlawfully [illegible] General [illegible] introduced evidence [illegible]

Under the [illegible] it is our conclusion [illegible] have been a [illegible] of [illegible] Regular [illegible] expressions [illegible] 499 at page 627, [illegible] added objection [illegible] to direct a verdict [illegible] testant. [illegible] to be governed by the [illegible] at law. (Dorrills v. [illegible] 288 id. 188, 190.) The [illegible] the benefit of all the evidence, [illegible] most favorable to him, together with all reasonable presumptions to be drawn therefrom. The motion raises the question whether there is any evidence fairly tending to prove the allegations of the bill. If such evidence

has been educed, although it may be opposed by the greater weight of the countervailing testimony, the case should be submitted to the jury."

The appellant has assigned as error the ruling of the trial court in rejecting its offer of evidence of its propositions, from A to K inclusive. One of the issues in the case was the good faith of the defendant and whether he was an innocent purchaser for value of the three cars in question. Anything that tended to show knowledge of plaintiff's title to these automobiles, at the time the defendant purchased them is material to the issues in the case. An answer to each of these propositions would tend to show the circumstances under which the defendant bought the cars. We think the tender of evidence was proper as tending to show the whole of the transaction.

There are numerous errors assigned why the judgment of the trial court should be reversed, but because of the error of the trial court in taking the case from the jury, we do not deem it necessary to pass upon the other alleged errors. The judgment of the trial court is reversed and the cause remanded.

Reversed and cause remanded.

has been caused, although it [illegible]
of the commonwealth [illegible]
jury."

The appellant has a [illegible]
court in re, setting [illegible]
to [illegible] the [illegible]
of the defendant [illegible]
of the three [illegible]
judge of [illegible]
defendant [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]
[illegible]
[illegible]
necessary [illegible]
the [illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9030

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

301 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9430 Ag. No. 7

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1939.

E. P. Kastien,

Plaintiff, Appellee

vs.

Northwestern Steel and Wire Company, a corporation,

Defendant, Appellant

Appeal from the County Court of Whiteside County.

WOLFE, J.

E. P. Kastien, the plaintiff in the court below, brought an action upon a contract with the defendant to recover a bonus, which he, the plaintiff, claims was due him from the defendant under said contract. The complaint of the plaintiff sets out the contract and alleged performance of the same. The defendant filed its answer in which it admitted the contract, but denied that the plaintiff had fully performed his part of the same. By the contract the defendant employed the plaintiff as its purchasing agent in its plant at Sterling, Illinois, at a salary of $500.00 per month and in addition was to pay the plaintiff a bonus of one-half of one per cent of the annual net profits of the company. Kastien was to faithfully represent the Wire Company and to serve its best interests. The contract continued in effect from November 24, 1935, to August 22, 1936, when it was terminated and the plaintiff was paid in full his salary of $500.00 per month, but the bonus was not paid. Whether the plaintiff earned this bonus is the main question involved in this suit.

The plaintiff himself, was his only witness. He testified to making the contract. The written contract was admitted in evidence. Plaintiff then stated the net earnings of the Company during the time that he was employed and that he had fulfilled his part of the contract. On cross-examination he identified a letter which he had written to Mr. P. W. Dillon, the President of the Northwestern Barb

Gen. No. 9430

Wire Company, in which he stated his dissatisfaction in the way the Company's business was being handled and advised many changes in its management. From a reading of the letter, it would lead one to believe that the writer was an Efficiency Expert instead of a man employed as purchasing agent for the Company. The letter also discloses that the plaintiff adopted an indifferent attitude toward the Company.

The only witness for the defendant was Mr. Paul W. Dillon, the President of the defendant Company. He stated that he had noticed that Mr. Kastien had become indifferent to the interests of the Company, prior to August 22, 1936, and that he had commented upon it to Mr. Hume, another employee of the company. Nowhere does the evidence show that Mr. Dillon ever said a word to the plaintiff, Kastien, about his work and so far as the record shows, Kastien performed his duty faithfully as purchasing agent of the company, according to the terms of the contract. The amount of net earnings of the company, for the time plaintiff was employed, is not in dispute. We think the trial court properly found that the plaintiff was entitled to a bonus of $750.14.

The appellant's third assignment of error is that "Even though the plaintiff was entitled to a judgment, he was not entitled to interest." It is the contention of the appellant in its written argument that the bill of particulars furnished by the plaintiff does not contain any item of interest. The bill of particulars follows the request of the defendant for the same. The plaintiff, in his complaint, asks for interest on the bonus of $750.14 from October 1, 1936, which is the time that the contract was terminated. The case went to trial on that issue. The contract of employment was in writing and we think the court did not err in allowing plaintiff ~~interest and we think the court did not err in allowing plaintiff~~ interest on the amount of bonus which was due him from the time the contract was terminated.

The judgment of the trial court is hereby affirmed.

Affirmed.

Wire Company, in which he acted [illegible] in the way the Company's business was [illegible] in its management. [illegible] one to believe [illegible] of a man [illegible] also disclosed [illegible] son of the [illegible].

The [illegible] place. [illegible] was [illegible].

[illegible] interest. [illegible] agreement [illegible] non [illegible] the [illegible] equal [illegible] 1898, when [illegible] went to trial on that [illegible] writing and [illegible] ~~interest and not being the [illegible]~~ interest on the amount of bonds [illegible] the contract was terminated.

The judgment of the trial court is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9435 Ag. No. 10

In the Appellate Court of Illinois

Second District

To the May Term, A. D. 1939

G. J. Jaffe, Doing Business as Jaffe Motor Co.; R. J. Chamberlain, Doing Business as R. J. Chamberlain Motor Co.; Romy Hammes, Milton Lang, Doing Business as Kankakee Buick Co.; Paul LeBeau, Doing Business as Le Beau's Auto Painting; Harry Yeates, Doing Business as Yeates & Betourne; Paul Lang, C. F. Close, Doing Business as Close Motor Service; George H. Lueth, John Hodak Doing Business as Hodak Motor Sales; Uptown Sales & Service, Inc.; Harry O. Mang and Fred H. Zeisler, Partners, Doing Business as Mang-Zeisler Motors; George Fortin and James E. Larsen, Doing Business as Larsen Auto Body Service,

Plaintiffs-Appellants,

vs.

Appeal from the Circuit Court of Kankakee County

Auto Mechanics Local No. 1049, International Association of Machinists, a Voluntary Association; Oren Floyd, Louis Fister and Fred Deterding,

Defendants-Appellees.

WOLFE, J.

On February 25, 1938, fifteen parties plaintiff filed their complaint in the Circuit Court of Kankakee County asking an injunction against the Automobile Mechanics Local No. 1049, International Association of Machinists and three individual defendants. The complaint alleged that the plaintiffs were in the business of operating and conducting automobile garages and service stations in the City of Kankakee, Illinois. The relief sought in the complaint filed was to restrain the defendants from picketing the several places of business of the plaintiffs and from strolling in front of, or in the vicinity of their place of business and from exhibiting any signs or placards characterizing the plaintiffs as unfair to organized labor, and from threatening the plaintiffs' employees any bodily injuries. Upon the filing of the complaint, a temporary injunction was issued, restraining the defendants from picketing the

Gen. No. 2925

I

G. J. [illegible]
Co.; F. [illegible]
H. J. [illegible]
Miller [illegible]
Butler Co.; [illegible]
Le [illegible]
Doing [illegible]
Lo [illegible]
Motor [illegible]
Police [illegible]
Town [illegible]
[illegible]
Mer [illegible]
[illegible]
Berr [illegible]

[illegible]
Association [illegible]
Wiel [illegible]
Defa [illegible]

[illegible]

[illegible]

their [illegible]
injunc [illegible]
nation [illegible]
the compl [illegible]
operating [illegible]
the City of [illegible]
filed [illegible]
places of [illegible]
of, or in the vicinity [illegible]
ing any alpha or placard [illegible]
organized labor, and from [illegible]
bodily injuries. Upon the filing of the complaint, [illegible]
junction was issued, restraining the defendants from picketing the

various places of business of the plaintiffs. The plaintiffs gave bond in the sum of $500.00.

On March 21, 1938, the defendants filed a motiom to dissolve the temporary injunction. On April 4, 1938, the defendants also filed a motion to dismiss the suit. These motions were heard by the court on April 4, 1938, and on December 6, 1938, the court entered an order finding "that the controversy grew out of a dispute concerning the terms or conditions of employment," as to all the plaintiffs except two, and that the motion to dissolve the injunction was denied, as to those plaintiffs and as two individual defendants, the injunction was made permanent, but as to the other defendants, the injunction was dissolved. It is from this order that the appeal has been prosecuted by the appellants, who are contending that the court erred in modifying the temporary injunction and in holding that the pleadings disclosed that the controversy grew out of a dispute concerning the terms or condition of employment.

The complaint consists of three counts and an amendment thereto, and in each of the counts it is specifically stated and charged that the "Plaintiff is not involved in any dispute of any kind with his employees and all of his employees have repeatedly stated to plaintiff that they were and are satisfied with the wages paid by plaintiff, the hours of their employment and the conditions under which they are employed; that the plaintiff has never objected to his employees joining or belonging to any organization or association or labor union, which they choose and has stated to his employees that they are free to join, or not to join any such organization, as they see fit." It is also specifically alleged in the complaint that the union officials ordered the men working for plaintiff to cease work and that people unknown to the plaintiffs were picketing the business places of the plaintiffs each working day from 8:00 o'clock a.m. to 5:00 o'clock p.m.; that men engaged in picketing

various places [illegible] bond in the sum of [illegible].

On March [illegible] solve the [illegible] also filed a motion [illegible] by the court [illegible] entered on [illegible] pete concerning [illegible] the plaintiffs [illegible] junction [illegible] defendants. [illegible] defendants, [illegible] the [illegible] concerning [illegible] junction [illegible] conference [illegible] tion of [illegible].

[illegible] tember, [illegible] charged that [illegible] hand with [illegible] stored to [illegible] paid by [illegible] under which they [illegible] to his employees [illegible] tion or labor union, which [illegible] that they are free to join, [illegible] as they see fit." It is [illegible] that the union officials [illegible] cease work and that people unknown to the plaintiffs were picketing the business places of the plaintiffs each working day from 8:00 o'clock a.m. to 5:00 o'clock p.m.; that men engaged in picketing

relieve one another and from one to three being on duty at a time, walking slowly upon the sidewalk in front of the place of business; that said pickets carry and display signs upon their chests and back approximately twenty to thirty inches in size, which bear the inscription "Unfair to Machinists Local 1049, Auto Mechanics."

The complaint further alleges that the inscription on said sign is a misrepresentation of the facts; that the plaintiff is not now and has not been unfair to said local union; that he has employed members of said local union in his shop, and has paid said employees wages, which have been satisfactory to them; that said employees both before and since the commencement of the suit have signified to the plaintiff that they have no grievance of any kind against him and that they are satisfied with their hours of employment, wages received and working conditions. The motion to strike admitted all of these facts and from the pleadings in the case, it is difficult to understand how the trial court found that the pleadings disclosed that the controversy grew out of a dispute concerning the terms or conditions of employment.

The questions presented for review in this appeal are fully settled by the Supreme Court in the case of Meadowmoor Dairies vs. Drivers Union, 371 Ill. 377. The latest expressiom of the Supreme Court, relative to such matters is Ross W. Swing, et al, appellees vs. American Federation of Labor, et al., appellants, case No. 25083. (The case not yet reported).

It is our conclusion that the trial court erred in modifying the temporary injunction and in holding that the pleadings disclosed that the controversy grew out of a dispute concerning the terms or conditions of employment. The order appealed from is hereby reversed and the cause remanded.

Reversed and the cause Remanded.

relieve one another [illegible]
waiting already [illegible]
that said plain [illegible]
[illegible]
[illegible]
[illegible]
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[illegible]
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[illegible]
[illegible]
[illegible]
[illegible]
appellee [illegible]
case [illegible]
[illegible]
the temporary [illegible]
that the [illegible]
conditions of [illegible]
and the cause remanded.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73947) 7

9029

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9439 Agenda No. 13

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Norvella M. LeMay,

Plaintiff-Appellee,

vs.

Jacob F. Mayer and Martha E. Mayer,

Defendants-Appellants.

Appeal from the Circuit Court

Ogle County

WOLFE, J.

Norvella M. LeMay filed her suit to foreclose a trust deed in the circuit court of Ogle County. The complaint charges that on March 1, 1920, Jacob F. Mayer and Martha E. Mayer executed and delivered their ten promissory notes each for $1,000.00 due five years after date and secured the same by trust deed on the property involved in this suit. The complaint further alleges that the plaintiff is the holder of five of the notes and that the same are past due and asks that a decree of foreclosure be entered and the property sold to pay the indebtedness.

The defendants appeared and filed an answer in which they admitted the execution of the notes and the trust deed, but denied that the plaintiff is the owner of the notes in question. The answer further charges that the notes in question have been paid; that on March 17, 1936, the defendants executed and delivered a deed to the premises in question to Marcellus Lincoln Rhinehart, a brother of the plaintiff for and in consideration of the cancellation of the mortgage indebtedness; that plaintiff and her brother took possession of said premises under said deed and that the defendants claimed no further interests in the property after the execution and delivery of the deed. The defendants also filed a counterclaim in which they set up the same facts as in their answer and asked that the notes in question and the deed of trust securing the same, be

Gen. No. 9425

In the A[illegible]

[illegible]

Norvelle [illegible]

[illegible]

vs.

Bacon F. [illegible]

[illegible]

COLA[illegible]

[illegible]

In the circuit [illegible]

March 1, 1922. [illegible]

def[illegible]

years after [illegible]

[illegible]

gift to the [illegible]

due and [illegible]

note to [illegible]

In order [illegible]

admitted the execution [illegible]

that the plaintiff [illegible]

further [illegible]

March 17, 1921, [illegible]

the premises in [illegible]

of the plaintiff for [illegible]

mortgage indebtedness; [illegible]

tion of said premises [illegible]

no further interests in the property [illegible]

livery of the deed. The [illegible] complained in the

which they set up the same facts as in their [illegible] and asked that

the notes in question and the deed of trust securing the same, be

ordered cancelled and returned to the defendants and the court find that by reason of said conveyance, the debt of the defendants to the plaintiff has been fully paid.

The case was heard without a jury and at the conclusion of the evidence, the court found the issues in favor of the plaintiff and entered a decree of foreclosure, which is in the usual form. From this decree, the defendants have prayed an appeal to this court.

The only point in dispute in the case is, whether the plaintiff, Norvella M. LeMay, accepted the deed executed by the defendants in full satisfaction of the mortgage indebtedness. There is no question about the execution of the notes and the trust deed, or that the notes are past due and have not been paid. Mrs. LeMay testifies positively that she never authorized anyone to accept the deed for her, nor did she individually accept the deed in satisfaction of the mortgage indebtedness.

After the deed was executed the firm of Smith & Menzimer, attorneys, filed a partition suit in the circuit court of Ogle County to partition the land. The record is silent as to who authorized the attorneys to bring this suit. The bill is not signed by Mrs. LeMay, herself, but her name is signed by Leslie W. Menzimer, her attorney. Leslie W. Menzimer testified that at the time he started the partition suit, he had no knowledge that Mrs. LeMay owned the mortgage notes. As soon as this came to his attention, he immediately dismissed the partition suit and all parties defendant except her brother, Marcellus Lincoln Rhinehart were dismissed out of the suit. The case stood simply as a suit for an accounting against the brother.

Mr. O. E. Huff testified that at the direction of Mrs. LeMay he went to the farm in the fall of 1935 and weighed corn from the farm in question, which was de livered to the elevator; that he kept an account of the corn which was delivered and reported the same

ordered accordingly [illegible]

that by reason [illegible]

the plaintiff [illegible]

the [illegible]

of the evidence [illegible]

this and [illegible]

from this [illegible]

the only [illegible]

plaintiff [illegible]

defendant [illegible]

is no [illegible]

or [illegible]

testimony [illegible]

deed [illegible]

of the [illegible]

[illegible]

attorney, [illegible]

to [illegible]

attorney [illegible]

hereafter [illegible]

legalize [illegible]

tion suit, [illegible]

ngtp. [illegible]

missed the [illegible]

Marcellus Lincoln [illegible]

stood simply as [illegible]

Mr. C. E. [illegible]

LeMay he went to the farm [illegible] the farm in question, which was [illegible] kept an account of the corn which was delivered and reported the same

to Mrs. LeMay. This evidence, as we view it, has no bearing upon the merits of the case, as the deed from the Mayers to Rhinehart was not executed until the following March.

The record discloses that Marcellus Lincoln Rhinehart had practically the exclusive control of the business relations between Mayers and the plaintiff and himself; that Mrs. LeMay had very little, if anything, to do in regard to it and that Rhinehart, no doubt, on his own behalf, accepted the deed in payment of his share of the mortgage indebtedness. There are circumstances tending to sho w that Mrs. LeMay also accepted the deed for her share of the indebtedness, but there is evidence tending to show that she did not so accept the deed. She testified positively that she did not. The chancellor, who heard the case, had an opportunity of hearing and observing the witnesses as they testified and is in a much better position to weigh the testimony of the various witnesses than a court of review. Unless this court can say that his finding of fact is manifestly against the weight of the evidence, we would not be justified in substituting our judgment for his. From the reading of the whole of the evidence, we cannot say that his findings are contrary to the weight of the evidence. Therefore, the decree should be affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9446

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1939, the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9446 Ag. No. 19

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A. D. 1939

Roberta Spangler, Plaintiff-Appellee	
vs.	Appeal from the Circuit Court of Iroquois County, Illinois.
L. A. Blackburn and L.C. Blackburn, partners doing business as G. W. Blackburn & Company, Defendants-Appellants	

WOLFE, J.

Roberta Spangler was the owner of a Nash Sedan and was driving the same in an easterly direction on U.S. Route 24. She was accompanied by her four daughters. At El Paso, Illinois, they invited George Pierson and his wife, Dorothy, to ride with them. Mrs. Spangler and her daughters were bound for some point in Indiana. As the car proceeded easterly several miles on the said route 24, they approached U.S. Highway No. 45, where 24 intersects the same. Route 45 runs north and south. Where route 24 intersects 45, they is a Y, one extending in a southerly direction and the other in a northerly direction, each connecting with route 45. As Mrs. Spangler drove her car onto route 45, it collided with a truck owned By L.A. and L.C. Blackburn, partners doing business as G.W. Blackburn and Company. The truck was being driven by Carl Goodall, the agent and servant of the said Blackburns. Mrs. Spangler's car was damaged and she sustained injuries as a result of the collision. The accident happened on July 28, 1936, about 2:00 o'clock, P.M.

On September 27, 1937, Mrs. Spangler filed a suit in the Circuit Court of Iroquois County against the Blackburns, alleging that it was through the carelessness and negligence of their agent and servant, the driver of the truck, that the collision occurred and she sustained damages thereby. The original complaint contained eleven counts, but the case was finally submitted to a jury on three counts. The first

count charges the defendant with general negligence. The second count charges that the truck was being operated at an excessive rate of speed and because of such rate of speed, the collision occurred and the plaintiff was injured. The fifth count charges that the truck was being driven on the left hand side of the black line in the center of the pavement, contrary to the Statute in such cases, made and provided, and by reason thereof, the collision occurred and the plaintiff was injured. The plaintiff alleges that at all times she was in the exercise of due care and caution for her own safety. These three counts are the only ones material to the issues in this case, as they are the only ones on which the case finally proceeded to trial. The case was tried before a jury and they found the issues in favor of the plaintiff and assessed her damages at $2,500.00. Judgment was entered upon the verdict and it is from this judgment that this appeal is prosecuted.

Mrs. Spangler, the plaintiff, testified that she was driving her car on route 24, at twenty-five to thirty miles an hour; that she crossed the Illinois Central Railroad tracks a short distance west of the Y which intersects with 45; that as she did so, she slowed the speed of her car and drove onto route 45 and had turned her car north, on the east side of the black line, when she noticed the truck of the defendant being driven on the wrong side of the road; that she drove the right wheels of her car off of the pavement onto the shoulder and that the truck struck her car and she was injured and her own automobile demolished. Mrs. Spangler called all of her daughters to testify as to the accident, but only one of them really saw the truck before the accident occurred. This daughter's testimony tends to corroborate the mother.

This is practically all the evidence introduced in behalf of the plaintiff, relative as to how the collision occurred. The defendant called the driver of the truck and his testimony is that he was driving south on route 45 approaching the y; that he saw the Spangler car coming from the west and supposed that it would stop before it came onto 45; that there is a standard state stop sign on the Y warning all cars to stop before going onto 45; that he was proceeding on his right hand side

count charges the defendant with [illegible] manslaughter. The second count charges that the truck [illegible] recklessly with a reckless disregard of speed and [illegible] and the plaintiff was injured. [illegible] was being driven on a [illegible] of the pavement, contrary to [illegible] vided, and by reason [illegible] was injured. The [illegible] exercise of the [illegible] are the only [illegible] only one [illegible] tried before [illegible] and [illegible] verdict [illegible]

[illegible] car [illegible] crossing [illegible] the [illegible] of his car [illegible] east side [illegible] being driven [illegible] which [illegible] truck [illegible] bus. [illegible] but only one [illegible] This [illegible]

This is [illegible] plaintiff, [illegible] called the [illegible] south on route 46 [illegible] from the west [illegible] that there is a standard stop [illegible] stop before going onto 46; that he was proceeding on the right hand side

of the black line at a speed of approximately twenty-five to thirty miles an hour, when the Spangler car, at a rapid rate of speed, came onto 45; that he saw that there would probably be a collision and he pulled his truck to the left side of the black line in order to avoid a collision, but that the Spangler car came on at a rapid rate of speed and struck his truck at the right side in the front. There were several other disinterested witnesses who saw the collision, and their version of how the accident occurred, strongly corroborates the driver of the truck. Several of the witnesses testified that what first attracted their attention, was the noise of the Spangler car, and the speed with which it was being driven as it crossed the Illinois Central Railroad tracks, a short distance west of the Y.

George Pierson and his wife, Dorothy, were both called as witnesses by the defense. George Pierson testified that he and his wife were sitting in the front seat with Roberta Spangler who was driving the car; that one of the daughters, just prior to the accident, had protested to her mother that she was driving too fast and that she would get out of the car if she didn't stop. He further testified that the accident occurred while the Spangler car was being driven onto route 45 and that the car had not crossed the black line when it struck the defendants' truck and that the right front part of Mrs. Spangler's car struck the right front part of the truck. He further testified that he had remonstrated with Mrs. Spangler about the way she was driving. Mr. Pierson further testified that when the car started into the fork of the road, he told Mrs. Spangler that she had better stop, for there was a stop sign there and a truck was approaching. He also stated that he was a truck driver, and that in his opinion, Mrs. Spangler was driving her car between forty and fifty miles per hour. Mr. Pierson stated that he had a suit for $10,000.00 against Mrs. Spangler for injuries he sustained through the accident, and in which he charges her with negligence.

Dorothy Pierson testified that she was riding in the front seat of the car with Mrs. Spangler and her husband; that she was sitting in the middle between Mrs. Spangler and her husband, and that the four

girls were in the back of the car; that they were driving easterly on route 24, and as they approached the Y, which connects with route 45, Mrs. Spangler first started to take the right hand side of the Y and found she was on the wrong side and turned to the left on the gravel, and as she did so, she swayed and got back on the pavement on the left hand side of the Y, and as the car was swaying, she said she heard one of the girls say, "My goodness mother, if you do that again, I am going to get out of the car." Mrs. Pierson testified that she saw the stop sign and that Mrs. Spangler did not stop the car and so far as she could see, the speed of the car was not slackened; that in her opinion, the Spangler car was being driven from forty-five to fifty miles per hour and continued to do so up until the time of the accident; that she saw the truck and that the Spangler car hit the truck on the right hand side near the front end; that at the time of the collision, the Spangler car had not crossed to the right side of the black line on route 45 and at no time were the two right hand wheels of the Spangler car off of the pavement on the right side.

A photograph of the truck which was taken after the accident, was introduced in evidence. An examination of this photograph discloses that the damage to the truck was to the right side, the radiator apparently is little damaged, the left front fender is slightly dented, but the left hand lamp of the truck is not broken. The manner in which the truck is damaged, makes it difficult to understand how the accident could occur the way Mrs. Spangler claims. Nearly all of the witnesses say that the right front of the Spangler car collided with the right front of the truck and this photograph tends to sustain that theory.

In rebuttal, the plaintiff and her four daughters were recalled, and each testified that they did not hear any one remonstrate with the mother in regard to the way that she was driving the car.

Ordinarily, the weight of the evidence is a question of fact for the jury to decide and after they have decided, a Court of Review will not interfere with their findings, unless they can say that it is contrary to the manifest ~~wink~~ weight of the evidence. We have read

girls were in the back of the car; that [illegible] driving northerly
on route 24, and as they [illegible] ice conditions [illegible] voice
45, Mrs. Spangler first [illegible]
and found she was on the [illegible]
travel, and [illegible]
on the left hand side [illegible]
she heard one [illegible]
again, I [illegible]
she saw her [illegible]
so far as the [illegible]
in her opinion, [illegible]
first [illegible]
statement; [illegible]
hand on [illegible]
the collision, [illegible]
the front [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
Nearly all of [illegible]
our confided with [illegible]
tends to [illegible]

In rebuttal, [illegible]
and each testified [illegible]
the mother in regard to [illegible]

Ordinarily, the weight [illegible] of fact
for the jury to decide and after they have decided, a court of review
will not interfere with their findings, unless they can say that it
is contrary to the manifest weight of the evidence. We have read

the evidence in this case, and it is our conclusion that the verdict of the jury is against the manifest weight of the evidence.

Objections are made in regard to several instructions. On the whole, we are of the opinion that the jury was fairly instructed, with the exception of instruction No. 7. We do not think this instruction should have been given in the form that it was, and on another trial, if presented, it should be given in a modified form. It directs the attention of the jury to negligence, wholly to the part of the driver of the truck, and the jury might be lead to believe that it implied that he violated the law.

For the reason above stated, the judgment of the trial court is reversed and the case is remanded.

Reversed and Remanded.

the evidence in this case, and it is [illegible] to the verdict of the jury is against the [illegible] weight of the evidence.

Objections are made [illegible] the whole, [illegible] with the exception of [illegible] instruction [illegible] another [illegible] It directs [illegible] just if the [illegible] there is [illegible] is proper [illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUG [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9396 Agenda No. 24

In the Appellate Court of Illinois,

Second District

February Term, A. D. 1939

Robert W. Petterson,

Appellant,

vs.

R. J. Cannell,

Appellee.

Appeal from Circuit Court

Winnebago County

HUFFMAN - J.

This was a suit by appellant to quiet title to a certain lot by having a warranty deed from him to appellee declared to be a mortgage, and for accounting. The complaint alleged that appellant was the owner of lot 11 in Morgan's River Forest Subdivision, located in the Town of Rockford and County of Winnebago; that in 1927, he became indebted in the sum of $300 and as security therefor executed a mortgage on said lot. Nothing appears to have been paid by appellant upon this loan and the same was renewed from time to time by the execution of new notes and mortgages in lieu of the unpaid debt and accumulated interest. Appellee became holder of the note and mortgage. It is alleged that on or about July 25, 1932, appellee requested appellant to make payment of the loan, whereupon appellant advised appellee that he had no money and was unemployed and could not make payment. It is then charged by appellant that appellee presented him with a ten dollar bill and requested him to sign a paper, which he advised him would enable appellee to collect the rents on the premises; It is alleged that appellee from said date has collected the rents on the property; that appellant in the month of March, 1937, requested appellee to account to him for the rents so collected, whereupon for the first time, appellant alleges that he was advised by appellee that he held a warranty deed to

said premises, which deed was filed for record on July 25, 1932, the date of its execution. The complaint then prays that such deed will be declared a mortgage; that an accounting will be taken of the rents received by appellee; and that appellee be ordered to reconvey to appellant.

Appellee answered, denying all elements of fraud in the transaction and alleging that he advised the appellant he was the holder of the note and mortgage secured; that he requested him to pay same and that unless he did so, foreclosure would result; that the taxes were unpaid and the premises in bad repair, to which he alleges appellant stated he was unemployed and had no money with which to pay the debt. Appellee further alleges that he told appellant if he would deed him the property in satisfaction of the debt, he would give him the privilege to repurchase same within a period of ten months, which period would expire on June 1, 1933, and that the repurchase price would be the amount of $563.85, which was then due on the loan, together with accrued interest and taxes paid by appellee to protect the property from delinquent sale. Appellee alleges that appellant agreed to the proposition and thereupon executed the warranty deed for the premises to him on July 25, 1932, and acknowledged the same before Rose A. Martigani, a notary public, and that said deed was duly recorded on said date. Appellee alleges that appellant fully understood the transaction; that it was further agreed appellant should be permitted to live in the house located on the premises, without rent, until June 1, 1933; and that at any time before said date he should pay to appellee the amount above referred to, thatsuch should be considered as a repurchase of the property by appellant and appellee would thereupon reconvey same to appellant by quit claim deed. It is then alleged that appellee and his wife in keeping with the agreement with appellant, executed a quit claim deed to the

premises to appellant as grantee, and placed same with the said notary public, with instructions that it be delivered to appellant, if payment was made by him as aforesaid, on or before June 1,1933; and that otherwise, the agreement to repurchase should become void. Appellee denies that plaintiff ever paid the sum agreed upon within the time, or any other sum, and denies that he ever called upon him to make any accounting or to explain the transaction; and that the first he knew there was any question about the matter was when this suit was filed in March, 1937. Appellee denies he asked appellant on the day of the execution of the deed if he could use ten dollars and thereupon presented him with such sum for the purpose of inducing him to sign a paper to defraud him. He alleges that he acquainted appellant with the facts and requested him to sign a warranty deed, which appellant then did with full knowledge and understanding of the contents and effect thereof, and understood that he was making the same in safisfaction of the debt, and to avoid a foreclosure with a possible deficiency decree. Appellee says he advised appellant that he would collect the rent on the property after June 1, 1933, if appellant failed to exercise his right to repurchase, and admits that following such date he has collected the rents on the property; denies that appellant learned for the first time in March, 1937, of the warranty deed; denies that appellant thought he still owned the premises after the execution and delivery of the deed; alleges that he has made extensive repairs upon the premises during the two or three years preceding the institution of this suit, and that because of the improvements thereon, appellant now desires to take advantage of him. He denies that he at any time acted as attorney or adviser of appellant; that appellant well knew him to be the holder of the note and mortgage; that appellant on July 25, 1932, was unable to pay the debt, and executed the deed to avoid the accumulation of costs and expenses incident to a foreclosure.

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the note and mortgage; that appellant on July 26, 1932, was un-
able to pay the debt, and executed the deed to avoid the accumu-
lation of costs and expenses incident to a foreclosure.

Upon a hearing of the case, the trial court dismissed the complaint for want of equity.

It appears from the evidence that the house in question was purchased from Sears, Roebuck & Company for $550.00. Appellee was called as a witness on behalf of appellant. He testified regarding the transactions substantially as set out in his answer. He states that when he received the deed to the lot, he gave appellant the cancelled notes representing the indebtedness and that appellant asked appellee's stenographer, Rose Martigani, to put them away and keep them for him. Appellant's note for $563.85, together with quit claim deed from appellee and wife to appellant, were placed by the stenographer in a safe used by her only. The stenographer figured up the amount due on the mortgage debt before the consummation of the transaction; and appellee in the presence of appellant, dictated to the stenographer the following: "This note to be delivered to Robert W. Petterson, with the attached deed, if paid before due. Otherwise, the note and deed to be void." These were the instruments the stenographer and notary public, placed in the envelope and deposited in her safe. It appears that appellant was not living in the premises prior to July 5, 1932, and had the same rented; that when appellee went to see him, he found him living down on Rock River, south of the City of Rockford. Here appellee advised appellant that the place had been forfeited for taxes; that he was in default in the payment of his interest and that a foreclosure suit would have to be brought. It was following this conversation that appellant went to appellee's office where the deed was made amd delivered.

In appellant's cross examination he states that he had the house rented and was living on an island down on Rock River; that appellee came down the river to see him and told him he was going to foreclose the mortgage unless he did something. He

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that appellee came down the river to see him and told him he

was going to foreclose the mortgage unless he did something. He

states appellee told him about the quit claim deed he and his wife would sign. He further states that he signed the warranty deed to appellee and knew what he was signing. Appellant, on his direct examination, states that appellee did not tell him he could get his property back at any time upon paying the money due; that he did not advise him that the signing of the papers was a peyment of the debt; and that he did not know he was signing a warranty deed. It appears from the testimony of the stenographer that when the transaction took place, the note was marked paid, and that everything but the release deed was offered to Mr. Petterson by appellee, and Petterson stated he did not have any place to keep them and asked the stenographer to keep them for him, which she states she did, and that she has not seen appellant back in appellee's office since. Appellant states that since the transaction he has never been back to appellee's office.

It is said in the case of Mutter v. Metzger, 324 Ill. 569, at p. 573, "The evidence to show that a written instrument in the form of a deed was in fact intended as a mortgage, - a mere security for the payment of money, - must be clear and convincing, as in all other cases where an attempt is made to control by parol evidence the course of a legal title contrary to the meaning of a written instrument purported to convey title." It is said in that case that the question of fact on which the issue was made, depended upon the testimony of the parties to the suit. Such is the situation in this case, with the exception that we have the testimony of the stenographer. Appellant admits upon cross examination that he knew and understood he was signing the warranty deed.

The mortgage debt had been constantly increasing by virtue of accumulated interest and delinquent taxes. Appellant's testimony regarding the transaction with respect to his being overreached and defrauded, is wholly insufficient to establish such

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The mortgage debt had been [illegible] in [illegible] value of accumulated interest and [illegible] [illegible] [illegible] money regarding the transaction with respect to his being overreached and defrauded, is wholly insufficient to establish such

charge. His statements with reference thereto are in most general terms, to the effect that he did not understand he was signing a warranty deed and thought he was signing a paper to enable appellee to collect rent from the premises to apply upon the mortgage debt. In his cross examination his testimony regarding the signing of the deed and other matters concerning the transaction are directly contradictory to his statements made in his direct examination. Neither do we see where his evidence in any way tends to prove that the deed was given in the nature of a mortgage or as additional security for the debt. The fact that appellant executed the deed on July 25, 1932, and knew that appellee went into possession of the property after June 1, 1933, and had been in possession of it for nearly six years, collected the rents therefrom, and never returned to appellee's office to see him about the matter until the beginning of this suit in 1937, also tends to refute his claim that he considered himself to be the owner of the premises. He states that following the transaction, he did not go near appellee and never set foot upon the premises.

An option to reconvey will not convert a deed absolute on its face into a mortgage. Longfellow v. Moore, 102 Ill. 289, 297; Rue v. Dole, 107 Ill. 275, 282; Caraway v. Sly, 222 Ill. 203, 205; Kimmel v. Bundy, 302 Ill. 514, 516, 517.

After a careful consideration of the evidence of the appellant, we find same insufficient to maintain his action and the decree of the trial court is affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9370 Agenda No. 1

In the Appellate Court of Illinois

Second District

February Term, A.D. 1939

R. W. Schmook, K. J. Kratz, Charles H. Larkin, and G. Geraldson, et al,

Appellees,

vs.

Charles Fane, Leonard Key, John Grunau, Byron Heaton and F. O'Donnell, et al,

Appellants.

Appeal from Circuit Court

Winnebago County

WOLFE, J.

This is an appeal by Charles Fane, Leonard Key, John Grunau, Byron Heaton and F. O'Donnell from a judgment and order of the Circuit Court of Winnebago County, finding them guilty of contempt of court for the violation of a temporary injunction issued against said appellants and others on May 13, 1938. The judgment and order, sought to be reversed, provides for fines and sentence of imprisonment of each of the appellants.

The petition filed sets out that 109 persons as plaintiffs, are employees of the J. I. Case Company of Rockford, Illinois. Fourteen parties are named defendants, including the appellants. The appellants are named as officials of Local No. 387, Workers of America, a labor organization. The complaint alleges that the defendants on April 22, 1938, entered into a conspiracy to prevent all laborers from entering or leaving the premises of the J. I. Case Company plant at Rockford, Illinois; that the appellants caused a large number of people to congregate near the entrance of the plant and prevented plaintiffs from gaining entrance thereto, and that at various times plaintiffs were denied access to the plant by threats and fear of violence; that the plaintiffs had no quarrel, or dispute

Gen. No. 3340

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[illegible]

R. W. [illegible]
E. [illegible], and [illegible]

[illegible]

Charles [illegible], [illegible]
Gruman, [illegible]
O'Lor[illegible], et al.

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WOLKEN, J.

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Gruman, [illegible] of the time [illegible] complaint of [illegible] issued [illegible] judgment [illegible] sentence of [illegible]

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The appellant [illegible] America, [illegible] defendant a [illegible] all laborers [illegible] Case Company plant at [illegible] a large number of [illegible] and prevented plaintiffs from [illegible] various times plaintiffs were denied access [illegible] threats and fear of violence; that the plaintiffs had no quarrel, or dispute

with the defendants or any of them; that the appellants had intimidated, threatened and assaulted employees of the company while attempting to gain access to the plant. The bill prayed for an injunction against the appellants and others to restrain them from interfering with or molesting the plaintiffs and other workmen from going to and from their work at said plant.

Affidavits of five employees were filed with the petition stating facts wherein employees of the company in attempting to go to work at the J. I. Case Company had been assaulted, threatened and prevented from going to work. The plaintiffs, by their attorney, on May 13, 1938, made a motion to have a temporary injunction issued without notice. The court issued a temporary injunction on the same day and restrained the appellants and others from interfering with the workmen of the J. I. Case Company, as prayed for in the bill of complaint.

On May 17, 1938, a petition was filed for rule to show cause why the five appellants should not be adjudged guilty of contempt of court for violation of the injunction. The appellants filed their answer to the petition for rule to show cause, in which they denied any and all acts in violation of the injunction order. The court heard evidence of both sides of the controversy and found the five parties guilty of contempt of court and imposed fines and jail sentences against each of them. It is from this order that the appeal is prosecuted.

It is first insisted that the court was without jurisdiction to issue the injunction, because the original petition was not properly verified. When the affidavit in the case is considered in connection with the allegation of the bill, we think it is sufficient, because the positive averments can be distinguished from those which are merely on information and belief, and all the material allegations of the bill are positively sworn to, so as to entitle

appellees to a temporary injunction. In the case of Will vs. City of Zion, 225 Ill. App. 179, there is, as in the case we are now considering, only one allegation in the bill, which is on information and belief, and is not one of the material allegations of the bill. We held the affidavit was good in the Will case. The general rule applicable to the verification of bills in equity is, that the affidavit should be in such form as to subject the parties making it to a prosecution for perjury in case the statements sworn to, prove to be false. Girhard vs. Yost, 344 Ill. 483. We think the affidavit in the present case is sufficient, and if the statements therein made are false, then the parties making such affidavit are subject to a prosecution for perjury. The bill as verified was sufficient to give the court jurisdiction of the subject matter and the parties to the suit.

It is also insisted that the court erred in granting the temporary injunction without notice to the defendants and therefore the injunction order was void, and the appellants could not be held in contempt of court for a violation of the injunction. In Fansteel Corporation vs. Lodge No. 66, 295 App. 323 at page 337, we there said, "Their only excuse for not complying with those orders was that they questioned the right of the court to issue the injunction. In this they were mistaken. It is the law of this state that if the Circuit Court had jurisdiction of the parties and the subject matter, then any order made in the exercise of that jurisdiction must be obeyed until it is reversed or set aside. (O'Brien v. People, 216 Ill. 354.) It is conceded that the court acquired jurisdiction of the persons of appellants and we hold that it had jurisdiction of the subject matter. The propriety of the orders issued by the Circuit Court is not before us for review." The above rule of law is applicable to the facts in this case. The court had jurisdiction of the subject matter of the suit and of the defendants and the

appellees to a temporary injunction. [illegible] of Zion, 225 Ill. App. 164, [illegible] considering, only one [illegible] formation and belief, and is [illegible] of the bill. [illegible] general rule [illegible] that the affidavit [illegible] meaning is to [illegible] to prove to [illegible] the affidavits in [illegible] merits therein [illegible] vit are relied [illegible] fied [illegible] matter and the [illegible] to [illegible]

[illegible] the temporary injunction [illegible] fore the high [illegible] hold in contempt [illegible] Ernestal Corporation [illegible] there said, "[illegible] was that they [illegible] tion. In this [illegible] if the Circuit Court [illegible] matter, then any order [illegible] be obeyed until it is reversed [illegible] 218 Ill. 554.) It is conceded that [illegible] of the persons of appellants and [illegible] of the subject matter. The property or the [illegible] Circuit Court is not before us for review." The above rule of law is applicable to the facts in this case. The court had jurisdiction of the subject matter of the suit and of the defendants and the

question of whether or not the Chancellor erred in issuing the temporary injunction is not before this court for review.

The appellants seriously insist that the evidence does not show that they violated the terms of this injunction. It is undisputed that the five appellants, including several hundred other men blockaded the street in front of the J. I. Case Company plant on the morning in question, as some of the employees were attempting to go to work, and the evidence also establishes the fact that some of these men were assaulted, and all of them were prevented from going to work; that the mayor, policemen and the sheriff attempted to get the crowd to disperse and let the workmen through, but that they were unable to do so; that the officers frequently told the assembled crowed they were blocking the street, and that there was a court injunction prohibiting them from doing so and that they should disperse and let the workmen through. There was an attempt made to get a car through the crowd so that the workmen could enter the plant, but the men blockading the street not only refused to let it pass, but shoved the car backwards; that copies of the injunction order were distributed by deputy sheriff among the assembled crowd; that the copies were torn up and jeering remarks made about them.

Mr. Folke Bengston, Sergeant of Police of the City of Rockford, testified that he saw the appellants, Charles Fane and Leonard Key both in the crowd and heard Fane say, "hold this street, don't let anybody through"; that he saw Mr. Key, as he was going through the crowd, telling the crowd to hold the street and he saw the other defendants (identifying them while sitting at the counsel table at the time of the trial) in the crowd which was blocking the street; that there was a call every little while, "hold that street"; that some of the men were sitting on the curbing and after this remark they ran back into the street and all rushed to the middle; that he heard people in the crowd say, "the injunction didn't

mean a thing, that laws were made to be broken; that they would hold that street until hell froze over"; that a car was trying to be driven and pushed through the crowd and there were yells in the crowd, "turn the car over". On cross-examination, he testified that he saw Fane and Key going through the crowd and heard them telling them to, "hold that line, we got business here and we mean business, don't let anybody through".

Mr. Frank Burke testified that he was an employee of the J. I. Case Company; that he tried to enter the plant and take a Mr. Floyd Carruthers in with him, but that Mr. Key and Mr. Fane asked him why he wanted to go in and he said he wanted to put in coal in the plant and they told him that he could not go in; that he tried to get in later and he was refused admission to the plant.

Mr. Vaughn Biggert, an employee of the company, testified that he knew appellants Byron Heaton, John Grunau and F. O'Donnell; that these three men were in the center of the line of men standing shoulder to shoulder in a solid line and blockading the street. He said he saw them in the crowd. "By blocking the street," I mean exactly what I said, "solid members of the group obstructing the road," and that Heaton, O'Donnell and Grunau were members of that group.

Walter E. Genrich, police officer, testified that he was at the scene of the trouble and saw Mr. Fane and Mr. Key talking to the pickets; that Mr. Key was in the center of the line and said, "hold that line."

Other witnesses were called and gave detailed information of what they saw and heard at this time. The appellants and several other witnesses were called in their behalf, and their version of what transpired differs materially from what the witnesses for appellees state the facts to be. The Chancellor who had an opportunity to observe the demeanor of the witnesses upon the

stand and hear their testimony, was in a much better position to judge the truth of the various witnesses' testimony than a court of review. Unless this court can say that his findings are against the manifest weight of the evidence, we would not be justified in holding that his findings are erroneous. From a review of the whole testimony, it is our conclusion that the Chancellor properly found that the five appellants had violated the terms of the injunction.

The appellants were given permission to file a supplemental brief and argument. The same has been filed, but it is very doubtful if the questions argued in the supplemental brief and argument are germane to the assignment of errors in the original brief. They question the sufficiency of the judgment and also claim that it is oppressive and in violation of the Constitutional provisions of the State of Illinois and United States, which prohibits involuntary servitude and cruel and unusual punishment, and provides that no person shall be deprived of life, liberty or property without due process of law.

We think that the judgment of the trial court is in proper form and not uncertain. The order finds that each of the defendants is guilty of contempt of court and then provides that each shall be fined a definite sum and shall be confined in the county jail until said fine is paid and in addition thereto, shall be confined in the county jail for a definite period. The same question was before the Supreme Court in the case of Hake vs. People, 230 Ill. 174, in which it is said, "the law is well settled that a court of chancery may impose a fine alone for the violation of an injunction and commit the party until the fine and costs are paid, or it may, in its discretion, fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with large discretion in enforcing obedience

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to its mandate and upon proceedings for attachment for its violation, the extent of the fine and the imprisonment to be inflicted for a contempt, rests in the sound legal discretion of the court itself. Courts of Appellate jurisdiction are exceedingly adverse to interfering with the exercise of such discretion, and will not ordinarily reverse the action of inferior courts in such matters."

From the facts, as disclosed by the record in this case, we cannot say that the Chancellor abused his discretion in inflicting the punishment he did on the various appellants, nor that the punishment is oppressive and unusual, for the violation of the injunction.

The judgment of the trial court is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

54

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9458 Agenda No. 28

In the Appellate Court of Illinois

Second District

To the May Term, A. D. 1939

People of the State of Illinois, on the relation of and in the name of Oscar Nelson, Auditor of Public Accounts of the State of Illinois,

Plaintiff,

vs.

The Farmers & Merchants State Bank of Leland, Illinois, a corporation,

Defendant.

Appeal from Circuit Court La Salle County

In the Matter of the Intervening Petition of Clarence Newton and Clyde Newton,
Intervening Petitioners and Appellees,

vs.

Leslie Hanson, Receiver of the Farmers & Merchants State Bank of Leland, Illinois,
Respondent and Appellant.

WOLFE, J.

This case was before this court at a former term in which the appellants, Clarence and Clyde Newton doing business as partners under the name of 'Newton Brothers', appealed from an order of the Circuit Court of La Salle County denying them a preferred claim, against the assets of the Farmers and Merchants State Bank of Leland, Illinois. At that time we held that the Newton Brothers were not entitled to a preferred claim, but under certain conditions, should be allowed a common claim. The Judgment of the trial court was reversed and remanded to the Circuit Court of La Salle County, with directions to modify the decree in conformity with the opinion.

The mandate of this court was issued and the case again re-docketed in the Circuit Court of La Salle County. The receiver of the bank, through his attorney, presented a decree and asked the court to sign the same, wherein the Newton Brothers would be

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The [illegible] of [illegible] re-docketed in the Circuit [illegible] of the bank, through his attorney, [illegible] the court to sign the same, whereat the Lawson [illegible] would be

given a common claim against the bank and directed to endorse the notes in question to the receiver of the bank. The Newton Brothers, by their attorney, objected to the court signing this decree, and presented another one which gave the Newton Brothers leave to withdraw and remove, from the records of the court, the six promissory notes that were involved in the suit. The court signed the latter decree. It is from this decree and the refusal of the trial court to sign the decree, as presented by the receiver of the bank, that this appeal is prosecuted.

The appellant insists that the decree of the trial court is not in conformity with the opinion of the Appellate Court, and its mandate to the Circuit Court of La Salle County. They insist that the strict interpretation of the opinion of the Appellate Court requires that the Newton Brothers accept a common claim against this defunct bank and surrender the six promissory notes to the receiver, and to accept whatever dividends would be payable to them as common claimants against the defunct bank. An examination of the petition filed by the Newton Brothers discloses that the only thing they ever sought from the bank was a preferred claim. Nothing was mentioned about a common claim and was not an issue involved in the former suit. The notes were filed with their petition for a preferred claim and were tendered to the receiver for the express purpose of having a preferred claim allowed. Because the Appellate Court found that they were entitled to a common claim, is no reason why they should accept it when they did not ask for it. If the appellees desire to keep their notes and waive their claim against the bank, they should be allowed to do so. The record shows that the appellees invested their money in good faith and one of the notes has not been endorsed by the bank. The receiver should be required to endorse it without recourse, so that the appellees should have

given a common claim against the [illegible] the [illegible] to
notes in question [illegible]
by their attorney, [illegible]
presented another [illegible]
drew and [illegible]
notes that were [illegible]
decree. [illegible]
to sign the [illegible]
that [illegible] is [illegible].

The [illegible]
is not in conflict [illegible]
the notes to [illegible]
that the [illegible]
[illegible] requires [illegible]
[illegible]
to the [illegible]
[illegible] to [illegible]
[illegible]
places [illegible]
[illegible]
was not [illegible]
filed with [illegible]
[illegible] to [illegible]
claim [illegible]
entitled to [illegible]
it when they did not [illegible]
keep their notes [illegible] their [illegible], they
should be allowed to do so. [illegible] appellees
invested their money in good faith and one of the notes has not
been endorsed by the bank. The receiver should be required to
endorse it without recourse, so that the appellees should have

the benefit of it.

The trial court did not err in signing the decree as presented by the Newton Brothers and the judgment of the trial court is affirmed.

Affirmed.

the benefit of it.

The trial court did not [illegible]

presented by the [illegible]

court in [illegible].

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____

Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 193[illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9347 Agenda No. 8

In the Appellate Court of Illinois

Second District

October Term, A.D. 1938

Robert Thomas, a minor, by Harry Thomas, his father and next friend,

Appellant,

vs.

Peter Siegman,

Appellee.

Appeal from the Circuit Court of Lake County

DOVE, P. J.

Robert Thomas, a minor, by Harry Thomas, his father and next friend, instituted this suit against Peter Siegman to recover damages for personal injuries sustained by Robert when he was struck by the automobile of Peter Siegman while crossing South Jackson Street in Waukegan. The complaint consisted of one count averring that Robert was struck by defendant's car while it was being operated by his son William Siegman, averred that Robert was walking across South Jackson Street, using due care for his own safety and charging that defendant's car was being operated negligently and at a greater speed than was reasonable and proper so that the driver thereof was unable to slacken his speed in time to avoid striking Robert. The defendant answered the complaint, denying the allegation of due care on the part of Robert and traversing all charges of negligence. A hearing was had before the court and jury and at the conclusion of the evidence offered on behalf of the plaintiff, the jury, in obedience to a peremptory instruction, returned a verdict in favor of the defendant, upon which judgment was rendered and the plaintiff appeals.

Upon the hearing William Urban, J. J. Sick, Ernest Spearman, Harry Thomas, the father of Robert, and Robert Thomas, testified and

from their evidence it appears that about six o'clock on the evening of December 29, 1936 William Urban, a young man twenty years of age, accompanied by Leo Jankauskas and Leonard Gemavich drove north on Jackson Street and stopped his car on the east side of that street opposite the Thomas home. That Leo left the Urban car and went into the Thomas home to get Robert to join them, intending to go to a boy scout meeting. That the Thomas home is in the middle of the block on the west side of Jackson Street. Leo and Robert came out of Robert's home, went directly east toward the street and stopped at the street curb to allow a car going south on Jackson Street to pass. At that time another car driven by the witness Sick was also coming from the north going south and according to Robert's testimony was seventy-five to one hundred feet away. Sick testified that he was driving about twenty miles per hour and saw the boys run into the street from the curbing, directly in front of his car and back of the other car that had just passed. He heard them yelling, saw them running and thought they were playing tag. This witness further testified that he had observed the lights on appellee's car when it was about one hundred feet away from him as it approached from the south going north and that when it came about opposite his car he heard a scream. Other than appellee's car there were no other cars approaching from the south. Mr. Urban testified that he observed the boys as they stood on the curb, that one car went by and that when they started across the street Leo was about four feet ahead of Robert and when Robert came within three feet of the left front fender of Urban's car, he was struck. At that time appellee's car was being driven by his son, who was taking appellee to his home, and was being driven, according to the testimony, between thirty and thirty-five miles per hour. The night was dark and there was a heavy fog. Ernest Spearman testified that he was a police officer

from their evidence [illegible] of December 23, 1[illegible] accompanied by [illegible] Jackson street [illegible] opposite the [illegible] the Thomas [illegible] boy [illegible] block on [illegible] of Robert [illegible] [illegible] park. [illegible] coming from [illegible] was driven [illegible] the [illegible] of the other [illegible] then [illegible] testified that [illegible] was about [illegible] south along [illegible] heard a [illegible] approaching from [illegible] the boys [illegible] when they [illegible] of Robert and [illegible] fender of Ulsa's car, [illegible] was being driven by [illegible] and was being driven, according to the testimony [illegible] thirty and thirty-five miles per hour. The night was [illegible] and there was a heavy fog. Ernest Spearman testified that he was a police officer

and learned of the accident and shortly thereafter went to the hospital where he saw appellee and his son and that the son stated he was driving about thirty miles per hour at the time of the accident and did not see Robert until he was just in front of his car. Robert testified that he looked south while standing on the curb and observed no car coming from that direction, that just as soon as the car in front of the Sick car passed, he ran into the street so as not to be hit by the Sick car and never saw appellee's car or its lights and never knew what struck him, that as he approached the parked Urban car, instead of going around it to the rear, he changed his mind, turned north and started to go around in front and when within a few feet of the side of the Urban car and when he was about even with its left front fender, he was struck.

Appellee insists that the evidence disclosed that appellant was guilty of such contributory negligence that as a matter of law there could be no recovery and therefore the action of the trial court in directing a verdict was proper. Counsel recognize that the law is that if the evidence taken as true and most favorably considered for appellant, together with all just inferences to be drawn therefrom, make out a prima facie case on the part of appellant, then the judgment must be reversed. In determining whether a prima facie case was made out, neither the weight of the evidence or the credibility of the witnesses can be considered. If there was any evidence in the record from which, standing alone, the jury might, without acting unreasonably in the eyes of the law, have concluded that the material averments of the complaint have been sustained, then it was the duty of the trial court to deny appellee's motion for an instructed verdict and submit the issues to the Jury. Kelly v. Chicago City Ry. Co. 283 Ill. 640.

From a consideration of all the evidence, it is apparent that the lights of appellee's car were burning and were observable through the fog for more than one hundred feet. Robert waited on

the west curb until the car in front of the Sick car had passed and then he ran into the street in front of the Sick car. Where he entered the street there was no cross walk, the closest one to the Thomas home being two hundred feet south. He crossed in the middle of the block and not at any street intersection. He was a normal boy and his hearing and eye sight were good. When he stopped at the curb of the parkway he testified that he saw the Sick car approaching from the north, that he looked to the south and did not observe appellee's car. Perhaps it was because the car which had just passed obscured his vision. The evidence is that he heedlessly left the curb on a dark, foggy night and ran east across the street between two automobiles, in front of one car and into the path of another and was injured.

Appellant was entirely familiar with the street, having lived thereon approximately ten years and had crossed the street many, many times. He knew the condition of the weather and that visibility was poor. There is no dispute about appellant's conduct. There is no disputed question of fact for the jury to pass upon. Under the authorities a normal boy between twelve and thirteen years of age may be guilty of contributory negligence as a matter of law, Kelly v. Chicago City Ry. Co., supra; Koehler v. Chicago City Ry. Co., 166 Ill. App. 571; Fannon v. Morton, 228 Ill. App. 415; Carlin v. Clark, 172 Ill. App. 239; Walldren Express Co. v. Krug, 291 Ill. 472; Wolczek v. Public Service Co., 342 Ill. 482.

Under the evidence in this record and under the foregoing authorities, we think the trial court did not err in holding that there could be no recovery and the judgment of the Circuit Court will therefore be affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

56

9443

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9443 AGENDA NO. 17

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MAY TERM, A.D. 1939

IDELL LANES,

Appellee

vs.

WALTER DUFFY,

Appellant

Appeal from the Circuit Court of Kane County.

DOVE, P.J.

The plaintiff, while riding in defendant's automobile as a guest passenger in the early morning of September 12, 1937, sustained injuries when his automobile came in collision with another automobile operated by Bert Wilderspin at the intersection of Main Street and Batavia Avenue, in the City of Batavia. On December 15, 1937, this suit was instituted by her to recover damages for the injuries she sustained and upon the trial of the cause a verdict was returned in her favor for $1500.00 upon which judgment was rendered and the record is brought to this court for review upon the appeal of the defendant.

The amended complaint consisted of four counts. The first count charged the defendant with willful and wanton misconduct in the operation of his automobile, the second with wilfully failing to keep a proper lookout for the Wilderspin automobile, the third with driving his automobile at an excessive rate of speed and the fourth count with wilfully failing to stop before entering the intersection. The answer of the defendant admitted that he was operating the automobile at the time and place in question and that plaintiff was his guest passenger, but denied all of the other allegations of the several counts of the complaint.

The evidence is that upon the evening of September 11, 1937 appellant, then twenty-five years of age and employed at his father's farm, attended a dance at Long's Barn at Kaneville.

IDEAL LAWN,

"ALLEY LOP".

NOTE, C.J.

The evidence is that upon the evening of September 11, 1937 appellant, then twenty-five years of age and employed at his father's farm, attended a dance at Long's Barn at Kenneville.

Appellee, twenty-one years of age, and Opal Munroe, a widow, twenty-nine years of age, were friends and both were employed as housemaids in the same home in Geneva and were at the dance on this evening, and when the dance concluded, about midnight, appellant, driving a Dodge, 1937, coach, accompanied by Opal Munroe and appellee, proceeded from Kaneville to Batavia. Main Street in Batavia runs in an easterly and westerly direction and Batavia Avenue is a part of State Route No. 22 and runs in a northerly and southerly direction and curves to the northwest at the point where the street and avenue intersect. A regulation highway department stop sign stood on Main Street about fifteen feet west of the west curbing of Batavia Avenue at this intersection. After leaving Kaneville, Opal Munroe drove a part of the way but at the time of the collision, appellant was driving and Opal and appellee were in the front seat with him. It had been raining and the pavement was wet. Appellant testified that while he was driving east on Main Street and had reached a point between fifty and sixty feet west of the intersection, he looked south and observed the Wilderspin car, which was then about two blocks south of the intersection, that he continued to the intersection traveling between twenty and twenty-five miles per hour, that when he arrived at a point where the rear of his car was about even with the stop sign, he stopped his car, shifted gears and entered the intersection, at which time he observed that the Wilderspin car was about a block away traveling about forty- or forty-five miles per hour. That there ~~was~~ were no other cars coming from any direction and he proceeded straight east into the intersection, traveling at the rate of three or four miles per hour, intending to turn northwest into Batavia Avenue, and had just started to make the left turn, the front bumper of his car then being just across the center line of Batavia Avenue, when appellee screamed "Look out, Walt", that he then applied his brakes and stopped and at that instant the Wilderspin car struck his car. Opal Munroe testified that when the rear end of appellant's car was about even with the stop sign, appellant shifted gears but she was unable to say whether the car came to a full stop or not. She did not see the Wilderspin car before

Appellee, twenty-one years of age, and [illegible] a widow, twenty-nine years of age, were [illegible] in the same home in [illegible] and when the dance concluded, [illegible] 1932, [illegible] Kenaville to [illegible] westerly direction [illegible] and runs to a [illegible] northwest [illegible] regal [illegible] fifteen feet [illegible] intersection. [illegible] the way [illegible] Opal and [illegible] tur and the [illegible] driving [illegible] and sixty feet [illegible] the [illegible] intersection, [illegible] twenty [illegible] where the [illegible] his car, a [illegible] observed [illegible] about forty- or forty- [illegible] cars coming [illegible] the intersection, [illegible] hour, intending [illegible] started to [illegible] just across the [illegible] "Look out, Walt". That is [illegible] that instant the Wildcrepin car [illegible] that when the rear end of appellant's car [illegible] sign, appellant shifted gears but she was unable to say whether the car came to a full stop or not. She did not see the Wildcrepin car before

the collision, but heard appellee scream and almost immediately appellant's car stopped and the collision occurred.

Appellee testified that as they approached the intersection appellant was driving about thirty-five or forty miles per hour, that she observed the Wilderspin car when the car in which she was riding was about one-half block west of the intersection, that she called appellant's attention to it, but he did not slow down or pay any attention to her, but continued driving at the same rate of speed into the intersection without stopping. Bert Wilderspin testified that as he was approaching the intersection he was driving about twenty-five miles per hour, that when he was three or four car lengths south of the intersection, appellant's car was about one-half block away, that he turned his head to see whether any car was coming from the east and that when he turned his head back he observed that appellant's car had stopped in the middle of the intersection about fifteen feet in front of him. On direct examination he stated appellant's car did not stop at the stop sign before it entered the intersection. On cross-examination he said he didn't know whether it did or not. Mrs. Minnie Wilderspin, wife of Bert Wilderspin, who was in the car with her husband, testified that when she first observed appellant's car it was about one-half block from the intersection as was also the car in which she was riding, that both cars were being driven about twenty-five miles per hour, that appellant's car did not stop before entering the intersection but suddenly stopped in the intersection about fifteen feet in front of the car in which she was riding. The evidence to some extent was conflicting as to the exact location of the cars immediately after the collision and various photographs of both cars were offered and admitted in evidence which do not appear in the abstract or additional abstract but which we have examined in the record.

It is first insisted by counsel for appellant that the trial court erred in excluding a statement made by appellee's attorney to Oscar Larson, the Sheriff of DeKalb County, suggesting that Larson might see appellant and if he, appellant, would assume the blame for this collision that it would probably result in the case being settled out of court;

that the court also erred in excluding a conversation had by appellee's attorney in the presence of appellee with Opal Munroe, whom appellee's attorney then represented and for whom he had a suit pending against appellant, in which he told her, Opal Munroe, not to get in the habit of telling people that she felt fine but to tell them she felt badly as a result of the injuries which she received in this collision; that the court also erred in excluding a conversation which Opal Munroe subsequently had with appellee's attorney on January 6th, 1938 in the presence of appellee, when she asked him to withdraw her suit and that he, in reply, said that the insurance company would have to pay and that she might just as well have the money, and that the court also erred in excluding a conversation which occurred that same evening at the home of appellant's father, in the presence of appellant and appellee and others, in which appellee's attorney stated that he came out to see if appellant "wouldn't go along with us" and that he, appellee's attorney, then told of similar cases he had had where a mother sued her daughter for the insurance money and of another case where he had no eye witnesses but had materialized one and stated that he wished the insurance company which had appellant was a larger company because the smaller ones were hard to settle with.

It is insisted that this proffered testimony was competent as tending to show an attempt on the part of appellee through her attorney to influence witnesses to give false testimony and in support of this contention counsel cites Chicago City Ry. Co. v. McMahon, 103 Ill. 485; Larsen v. Ward Corby Co., 184 Ill. App. 38 and Stevenson v. Avery Coal and Mining Co., 143 Ill. App. 397. We have examined these cases and what they hold is that any evidence which tends to show that a party or his attorney sought to influence, destroy, fabricate, or suppress evidence is competent and admissible. In our opinion, however, this proffered testimony does not come within the rule announced by these cases and its admission would have raised an immaterial and irrelevant issue and the trial court properly excluded this evidence. In so holding we do not wish to be understood as approving of counsel's conduct in going to appellant's home after he had employed counsel who had entered their appearance as such counsel of record.

It is next insisted that the court erred in its instructions given to the jury on behalf of appellee. The first instruction covers six pages of the abstract. It states very fully and at length the allegations of each of the four counts of the amended complaint and the allegations of the amended answer of the defendant, thereby defining to the jury the issues made by the pleadings. While this instruction is long and could perhaps have been condensed, it was entirely proper for the court to clearly define the issues and it was not error to give this instruction. Murphy v. King, 284 Ill. App. 74 and cases there cited. The criticism of counsel to three other given instructions is that they would tend to confuse and mislead the jury and that given instruction number eleven singles out a particular fact and excludes others and is therefore bad. We do not think so. Instruction number eleven was not a peremptory instruction and when considered with other given instructions it was proper.

It is insisted that the verdict is manifestly against the weight of the evidence and that therefore the trial court should have set aside the verdict and granted a new trial. The remarks of the trial judge when he disposed of appellant's motion for a new trial appear in the record. He referred to appellee's testimony upon the trial and to her signed statement taken at the hospital September 16th, 1937, which was introduced in evidence and read to the jury. In this statement appellant detailed the trip from Kaneville with Opal Munroe and appellant and said that as appellant approached Batavia Avenue he was driving at a slow rate of speed and slowed down at the intersection and it seemed to her that he came to a complete stop before he entered the intersection. The court also referred to the testimony of Mr. and Mrs. Wilderspin and other facts and circumstances appearing in the evidence upon the trial and declined to set aside the verdict of the jury. In many material points the evidence is conflicting. It was therefore clearly and peculiarly the province of the jury to pass upon the credibility of the witnesses and determine the facts in this case. We have read the record with care. In the absence of any prejudicial error by the court in excluding competent evidence from the consideration of

the jury or in its instructions to the jury as to the law to be applied to the facts as the jury found the facts to be, it is not our province to substitute our judgment for that of the jury when its verdict has had the considered approval of the trial judge.

Finding no reversible error in the record, the judgment will be affirmed.

JUDGMENT AFFIRMED.

the jury or in the [illegible] filed
to the facts as [illegible]
to substitute our [illegible]
had the [illegible]
finding no [illegible]
affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9351 Agenda No. 30

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1938

Charles DeLeuw and Company,
a Corporation,
Appellee

vs.

City of Dixon, a municipal
corporation,
Appellant.

Appeal from Circuit Court,
Lee County.

HUFFMAN - J.

Appellant city desired to construct a sewage disposal plant together with a system of intersecting sewers to divert the sewage to such plant. Pursuant to this situation, appellee corporation, which was engaged in the business of civil and municipal engineering, submitted its written proposal to the city for engineering services in connection with the proposed work. The proposal was submitted in writing on July 29, 1933. On August 7, 1933, the city council duly accepted the proposal as made, and agreement between the parties for the work to be done by appellee, followed. Plans, specifications, estimates and all necessary data were made and filed by appellee with appellant. The same together with the report filed therewith were approved and adopted by the city council on November 14, 1933. Thereafter such report, plans, specifications, estimates and data were filed by the city with the Federal Emergency Administration of Public Works, together with its application for an allotment of funds and for purchase of bonds to be issued by the city, for the cost of the proposed improvement. These matters were approved by the Public Works Administration and the city through its Mayor advised the authorities that the city was ready to proceed with the steps necessary to advance the work. Pursuant to the foregoing and on August 6, 1934, the council passed a sewer revenue bond ordinance and a rate

ordinance. Thereafter a petition for a referendum was filed by the requisite number of voters for the issuance of the sewer revenue bonds in order that the city might avail itself of the grant of financial aid of the P.W.A. The date of the election to vote upon the issuance of the bonds is alleged to have been intended to be set for November 6, 1934. It appears by appellant's only witness, Mr. Gannon, city attorney, that due to certain opposition then existing to the proposed improvement, the city administration was apprehensive that the bond issue might not carry, and not wishing to submit the proposition and have it defeated, the sewer revenue bond ordinance was repealed by the council on September 24, 1934, with a view in mind of educating the public to the necessity of a sewage disposal plant.

On November 10, 1934, Mr. Harold L. Ickes, Administrator of the Public Works Administration, wrote a letter to the Mayor of the city of Dixon in which he advised him that on July 26, 1934, he had mailed a contract for a loan and grant in the amount of $285,000, for the construction of the proposed sewage system, and that the appropriations made by Congress for such work was exhausted; that he could not permit such a retardment of the recovery program as was involved in the failure of appellant city to execute and return the contract referred to. The Mayor was advised in this letter that unless the above contract, properly executed, was received by Mr. Ickes within ten days from November 10, 1934, that action to rescind the loan and grant covered by the contract would be taken. Following the receipt of this letter, the Mayor on November 19, 1934, wired the P.W.A. that he was mailing the contract referred to in the foregoing letter, and that the same was duly executed. On the date of the telegram, November 19, 1934, the contract of loan and grant, properly executed by the city, through its officers, was mailed to the Public Works Administration at Washington and reference in the letter enclosing same was made to the wire sent on said day. Nothing further appears to have transpired with respect to the proposed improvement, except inter-

ordinance. Thereafter [illegible] the requisite number of [illegible] bonds in order [illegible] financial [illegible] the issuance of [illegible] for November [illegible] Canvas, since [illegible] to the proposed [illegible] that [illegible] was repealed by [illegible] mind of [illegible] place.

[illegible] failure of [illegible] to. [illegible] treas, [illegible] from [illegible] covered by [illegible] letter, the [illegible] was mailing [illegible] the sore was [illegible]

19, 1954, the [illegible] city, through its [illegible] tion at Washington and [illegible] made to the wire sent on said day. [illegible] transpired with respect to the proposed improvement, except inter-

change of letters between the city administration and the P.W.A., until on February 6, 1935, when the P.W.A. adgised the city through its city attorney that the allotment previously made for the proposed work was rescinded, but that should the city desire to reinstate its application at a later day, the same would be considered without prejudice.

In the spring of 1935, a new city administration tookoffice. Under the new administration the application of the city was reinstated and another loan granted. The new administration entered into a contract with another firm of engineers and another set of plans, specifications and estimates were prepared by the new engineering firm. The proposal for issuance of bonds was submitted and carried. The proposed sewage system was installed upon the second venture at a total cost of $293,633.80, of which forty-five per cent was a P.W.A. grant and the balance thereof covered by the bond issue as voted by the citizens.

Under the proposal as submitted by appellee relative to the installation of the sewage plant, appellee was to receive as its pay, three per cent of the contract cost of the work for the plans, surveys, specifications and estimates, which was work to be done prior to installation, and two per cent of the final cost of the work for supervision and inspection of the construction. Appellee brought this suit seeking recovery both upon a quantum meruit and upon its contract, claiming that it had stood by ready and willing at all times to go forward with the work it had contracted to do, for and on behalf of said city, but that it was not permitted to do the work. It appears that appellee expended in wages the sum of $3994.93, in the preparation of its survey, report, plans, specifications, estimates and data relative to the proposed work; that in addition to this it incurred $1264.98 other expenses. The case was tried by jury and a verdict returned in favor of appellee for $3000. At the close of plaintiff's evidence, appellant moved for an instructed verdict, which motion was overruled. Appellant's evidence consisted of certain exhibits and the testimony of Mr. Gannon, city attorney.

Appellant urges that appellee cannot recover because under the contract it was to receive its remuneration from a special fund and that such fund was not lost because of any negligence or wrongful conduct on the part of appellant. The city entered into the contract with appellee, accepted the benefits of the work done, and upon the report, plans, specifications, estimates and data as prepared by appellee secured the P.W.A. grant which would have enabled it to do the work. It passed the necessary ordinances relative to the doing of the work. It voluntarily repealed these ordinances at a later date and through its delay produced such a "retardment of the recovery program" as to cause the P.W.A. to rescind the allotment or loan made for this project. According to the letter of Mr. Ickes the contract for the loan was mailed to the appellant on July 26, 1934. Here it remained unacted upon until November 19, 1934, when pursuant to the letter above referred to, the Mayor wired that the contract had been signed and returned to the P.W.A., accepted the grant for this work. At this time the sewer revenue bond ordinance and the rate ordinance had both been repealed and no ordinances had at that time been enacted to take their place. Subsequently and on February 6, 1935, through the continued inaction of the appellant, the grant was finally rescinded and cancelled. Appellee had no control over the action of the city council with regard to the above matters. It performed its services as far as possible and they were accepted both by appellant and the P.W.A. It is generally considered that where a project of this character is not carried to completion because of the abandonment of the proposed work by the municipality, that it cannot avoid payment by setting up the contingent nature of the contract and that such expense was to be paid from special tax or special fund, but the city will be held liable out of the general fund. Bunge v. Downers Grove San.Dist., 356 Ill. 531, 537; Mann v. Downers Grove San. Dist., 281 Ill. App. 412, 422; Deleuw & Co. v. City of Charleston, 298 Ill. App. 403, 411; Gray v. City of Joliet, 287 Ill. 280.

Appellant urges that [illegible]
contract it was to receive its [illegible]
that such fund was not [illegible]
conduct on the part of [illegible]
with appellee, [illegible]
report, plans, specifi[illegible]
appellee [illegible]
the work. It [illegible]
of the work. [illegible]
date and [illegible]
property [illegible]
for this project. [illegible]
to the [illegible]
received [illegible]
letter [illegible]
[illegible]
[illegible]
[illegible]
to [illegible]
the [illegible]
and [illegible]
contract [illegible]
as [illegible]
[illegible]
solar [illegible]
proposed [illegible]
setting up [illegible]
was to be paid [illegible]
held liable [illegible]
336 Ill. 321, 327; [illegible] v. [illegible] [illegible], 412,
422; Delaw & Co. v. City of [illegible], [illegible] Ill; Gray
v. City of Joliet, 297 Ill. 230.

Appellant objects to appellee's given instruction. Only one instruction was offered by appellee. It is directed toward recovery based upon a quantum meruit and from an examination thereof we discover no error in the instruction.

The record in this case is large, the abstract containing over five hundred pages. The work done by appellee in preparing the surveys, plans, specifications and estimates of the proposed work were extensive and in detail. It was upon same the city obtained the P.W.A. grant. Appellee had no way of knowing the city administration would later become apprehensive of the attitude of the people toward the bond issue and would repeal the ordinances, and allow the P.W.A. grant to expire by its failure to act.

The judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

9441

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9441 Agenda No. 15

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Carter H. Harrison, Jr.,
Successor Receiver to Frank
J. Cimral of The Bowmanville
National Bank of Chicago, Ill.,

Appellant,

vs.

Lida N. Safford, Dora S.
Safford and Tirrie C. Prather,
Administrator of the Estate
of George N. Safford, Deceased,

Appellee.

Appeal from the Circuit Court

Winnebago County

HUFFMAN, J.

The Bowmanville National Bank of Chicago, hereinafter referred to as the bank, had been in existence for many years prior to June 20, 1932. On this date it suspended business due to insolvency. Mr. George N. Safford of the City of Rockford had for a long time been the owner of forty-five shares of stock in said bank. At the time the bank closed, Mr. Safford and his wife Lida, were the owners as joint tenants of a tract of real estate which we herewith designate as tract one; and Mr. Safford was the owner of a tract of real estate which we herewith designate as tract two. On June 22, 1932, Mr. Safford and his wife Lida, conveyed tract one to Mr. Safford's sister Dora; and on the same day Dora reconveyed said tract one back to Mr. Safford's wife Lida. On September 29, 1932, the comptroller of the currency caused demand to be made upon the stockholders of the bank to pay an assessment equal to the par value of the stock held by them. On October 14, 1932, Mr. Safford and his wife Lida, conveyed tract two to Mr. Safford's sister Dora, subject to a mortgage indebtedness of $3000. On January 12, 1933, Mr. Safford died intestate, leaving as his sole

Gen. No. [illegible]

In t[illegible]

Carter [illegible]
Successor [illegible]
L. [illegible] of [illegible]
National [illegible]

[illegible]

[illegible]

[illegible]
[illegible]
[illegible]
of [illegible]

[illegible]

[illegible]

The [illegible]
[illegible]
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solvency. [illegible]
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On June [illegible]
to Mr. [illegible]
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1932, the [illegible]
upon the stockholders [illegible]
the par value of the stock [illegible]
Mr. Safford and his [illegible]
sister Dora, subject to a mortgage in [illegible]
January 12, 1933, Mr. Safford died [illegible], leaving as his sole

heirs, his wife, Lida, and his sister Dora. No administration was instituted on the estate of the deceased by his heirs. The receiver of the defunct bank filed petition for letters of administration, whereupon the court appointed Tirrie O. Prather as administrator of the estate. Appellant filed his claim against the estate of the deceased for the principal sum of $4500. The claim was duly allowed, but not satisfied. Appellant thereafter filed this suit in the Circuit Court of Winnebago County to set aside the above conveyances on the ground of fraud, alleging they were made without consideration and for the purpose of hindering and delaying appellant and other creditors of said deceased, in the collection of their just demands. At the close of plaintiff's evidence the court dismissed the complaint for want of equity, on motion of the defendants Lida Safford and Dora Safford. It is from the above action of the court, appellant prosecutes this appeal.

No transcript of the evidence is presented by the record. The case is submitted on an agreed statement of facts. The foregoing statement of the case reflects the contents of the stipulation of facts with the exception that such stipulation contains the additional statement that appellees Lida Safford and Dora Safford knew at the time of the execution and exchange of the deeds to tracts one and two, that Mr. Safford was the owner of the bank stock as aforesaid.

The wife, Lida, filed her answer admitting the exchange of the deeds and denying all allegations of fraud. She alleges that the deed to her for tract one was in partial satisfaction of money which she had advanced to her husband and for which he was indebted to her. She filed an amendment to her ahswer wherein she set up that this action was not brought within five years from the making of the deeds, and charged laches. Appellee Dora Safford, admitted the exchange of the deeds as alleged and denied all fraud in connection therewith. She further alleged that she was the equitable

heirs, [illegible]

instituted [illegible]

of the [illegible]

wherein [illegible]

the [illegible]

deceased [illegible]

on, [illegible]

[illegible]

[illegible]

and [illegible]

[illegible]

[illegible]

for [illegible]

[illegible]

[illegible]

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[illegible]

the time [illegible]

and [illegible]

[illegible]

the deeds [illegible]

the deed to [illegible]

which are [illegible]

to her. The [illegible]

that this action was not [illegible]

of the deeds, and charged [illegible]

the exchange of the deeds as alleged [illegible]

connection therewith. The further alleged [illegible] the equitable

owner of tract two; that George Safford had no interest therein whatever, and made the deed in question merely for the purpose of transferring to her the record title to property which she already owned. She filed an amendment to her answer in regard to the charge of laches which was identical with that filed by Lida Safford. Appellant took leave to file an amendment to its complaint in answer to the above amendments by appellees to their answers, and set up that it had no knowledge of the deeds and no knowledge of the fraud charged until just prior to the bringing of this suit, to which amendment appellees replied that the deeds were recorded immediately following their execution.

The situation presented by the record in this appeal is spmewhat unusual. By stipulation of the parties the ownership of the forty-five shares of stock in the bank by Mr. Safford is admitted; the failure of the bank is admitted; the voluntary conveyances of the pwoperty without a present consideration passing between the parties is admitted; and the insolvency of Mr. Safford appears. The conveyances in question left him without any visible available means with which to pay appellant's claim and without any property from which satisfaction thereof might be had. Under such circumstances the burden was upon appellees, "of dispelling the implication of fraud as against pre-existing creditors." Birney v. Solomon, 348 Ill. 410, 415. With reference to the allegations contained in Mrs. Safford's answer claimimg that the transfer to her was made in consideration of a pre-existing debt, the rule is that where an immediate member of a family is preferred as a creditor, there must be clear and satisfactory proof of a valid existing debt which could be enforced and payment exacted. Bartell v. Zimmerman, 293 Ill. 154, 163. No evidence was offered by Mrs. Safford with respect to the indebtedness claimed to be due from her husband. No amount is set out in her answer, and no date or dates are given as to when any

of such money was advanced. Dora Safford answers the charge that no consideration changed hands between her and her brother at the time of his making the deed to her for tract two, by claiming to have already been the owner of tract two. As stated in Birney v. Solomon, supra, the burden was upon her to dispelthe implication of fraud, which the law raises against grantess in transactions of this character, where the grantor was indebted at the time of the conveyance and proved to be insolvent following same. In this chass of cases, proof of fraud is seldom possible by direct evidence. Therefore recourse to circumstantial evidence is rendered necessary, and fraud may be made to appear by circumstances which convince the mind of its existence. Swiney v. Womack, 343 Ill. 277, 283; Schwarz v. Reznick, 257 Ill. 479, 485; Reed v. Noxon, 48 Ill. 323.

It is urged by Dora Safford that this case should be reviewed by this court solely upon the complaint and answer, claiming that her answer set up new matter which was an affirmative defense, that no reply was filed thereto, and therefore her allegation that tract two already belonged to her must be taken as true under para. 2, sec. 164 of the Civil Practice Act. In support of this position she cites Watt v. Cecil, 363 Ill. 510. As above stated, in transactions of this character the law places the burden upon the grantees to dispel the implication of fraud raised against them. The absence of a present consideration passing from the grantee to the grantor in these conveyances was the object of this suit. Such situation appears by the stipulation of facts. Therefore the burden of explanatory proof was upon the grantees. A mere denial of fraud will not prevail against such a state of facts, as they tend to show the transactions fraudulent. We do not consider the defenses raised by appellees to be more than matters of defense going to refute the charge of fraud based upon want of consideration passing between the parties at the time of the exchange of the deeds.

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have [illegible]
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plaintiff proof [illegible]
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transactions fraudulent. [illegible]
by appellees to be more [illegible]
the charge of fraud based upon [illegible]
tween the parties at the time of the exchange of the deeds.

Neither defendant can be said to have set up by her answer anything more than a state of facts going to dispel the implication of fraud arising from undisputed matters. They amounted to nothing more than a denial of the fraud charged by setting up facts which would permit them to offer explanatory proof to dispel the implication of fraud arising against them. Such burden being upon them, it was necessary that they set up in their answer matter going to refute the presumption of fraud.

As the record stands it is devoid of any testimony going to support the matters set up by appellees as a defense to this action. The bill charged want of consideration. This was the gist of the complaint and the basis of the action. Appellees answered, setting up explanatory matter, but no proof was offered thereon. A fraudulent intent will be presumed from the fact that a grantor making a voluntary conveyance is indebted at such time. State Bank of Clinton v. Barnett, 250 Ill. 312, 318.

Under the state of the record, we are of the opinion this cause should be reversed and remanded. The decree is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS.
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9448 Agenda No. 21

In the Appellate Court of Illinois

Second District

May Term, A. D. 1939

Frank W. Gibson, Administrator
of the Estate of Matilda Hansen,
deceased,
Appellant,

vs.

A. P. Shearburn,
Appellee.

Appeal from the Circuit Court
Bureau County

HUFFMAN, J.

This was an action for an accounting brought by appellant against appellee. The complaint was filed in April, 1938. The defendant filed its motion to dismiss, which motion was in the nature of a demurrer. A hearing was had on the motion to dismiss. The motion was allowed, whereupon, on motion of the plaintiff, he was granted leave to file an amended complaint within ten days. Thereafter and within the time provided plaintiff filed his amended complaint. Subsequently, defendant moved to dismiss the amended complaint on the ground that the court had previously entered its judgment in sustaining the motion to dismiss the original complaint, and that since such time, no action was pending between the parties and therefore no cause before the court wherein plaintiff could file an amended complaint. The motion to dismiss the amended complaint upon the above ground was granted. The plaintiff filed a motion to vacate the order dismissing the amended complaint, which motion was denied and plaintiff has prosecuted this appeal from the action of the trial court.

The trial court in ruling upon the motion to dismiss the original complaint, grants such motion and by the same order grants the plaintiff ten days within which to file an amended complaint in said cause. An order merely sustaining a demurrer to

Gen. No. 9448

[illegible]

Frank [illegible],

of the [illegible]

deceased,

[illegible]

v.

[illegible]

[illegible]

[illegible]

[illegible]

defendant filed [illegible]

motion [illegible]

the [illegible]

[illegible]

There [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

wherein [illegible]

to dismiss [illegible]

The plaintiff filed [illegible]

amended complaint, [illegible]

prosecuted this appeal from [illegible]

The trial court in [illegible]

original complaint, grants [illegible]

grants the plaintiff ten days within which [illegible] amended

complaint in said cause. An order merely must bring a demurrer to

a complaint, or a motion to dismiss which is in the nature of a demurrer, and upon which no judgment is entered, is not a final adjudication. Freeman on Judgments, (5th ed.) Vol. 2, p. 1512, para. 717. This rule is observed in the case of Trebbin v. Thoeresz, 316 Ill. 30, 32; Barber v. Wood, 318 Ill. 415. Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without, or words of similar import and meaning. Chicago Portrait Company v. Crayon Company, 217 Ill. 200. This same principle is announced in the cases of County of Franklin v. Blake, 257 Ill. 354; Williams v. Huey, 263 Ill. 275; and Prange v. City of Marion, 297 Ill. App. 353.

No attempt by the court was made to enter judgment upon the motion to dismiss as filed to the original complaint, but on the contrary, the court granted the plaintiff additional time within which to plead. Plaintiff complied with the rule by filing his amended complaint within the time fixed. The subsequent motion of defendant-appellee to dismiss the amended complaint due to the fact no cause of action was left pending between the parties after the court's ruling on the motion to dismiss as filed to the original complaint, was without foundation. The order granting such motion does not contain the elements of a judgment. Under such circumstances appellant's motion to vacate the order entered on January 17, 1939, dismissing the amended complaint on the ground that no action was pending between the parties, should have been granted. For theabove error, the cause is reversed and remanded to the trial court with directions that the motion of appellant to vacate the order dismissing the amended complaint be granted, and for such further proceedings as the parties may elect to take.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73947) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9343 AGENDA NO. 29

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1938

MABEL THUROW, Appellant, vs. CLARENCE THUROW, Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF KENDALL COUNTY

DOVE, P. J.

This is a suit for divorce brought by Mabel Thurow, whose complaint charged her husband, Clarence Thurow, with extreme and repeated cruelty. An answer was filed denying the charges in the complaint and a hearing before the Chancellor resulted in a decree dismissing the complaint for want of equity. From this decree the plaintiff appeals.

The evidence discloses that appellee (hereafter referred to as the defendant) weighed at the time of the hearing one hundred eighteen pounds and was thirty-seven years of age, a farmer and with his brother operates his own farm and five other farms known as Colonel Robert R. McCormick's Tribune Farms. Appellant (hereinafter referred to as the plaintiff) was twenty-three years of age at the time of the hearing, weighed one hundred thirty pounds and is the daughter of George Harkness, a farmer living a few miles

south of Yorkville. On June 11, 1935 the parties were married and went to live on a farm and continued to make that their home until May 10, 1937, when the plaintiff returned to the home of her parents and on August 3, 1937, instituted this suit.

The acts of cruelty charged in the complaint are alleged to have occurred on July 12th, 1936, and on February 12th, 1937. The evidence is that on July 12, 1936, the defendant had gone to Chicago and plaintiff had driven to Aurora and upon the return of both parties to their home, a quarrel ensued. The evidence is sharply conflicting as to who provoked the quarrel or just what occurred. According to the testimony of the plaintiff, the defendant called her father a hypocrite and she retaliated by stating that defendant's deceased father was a drunkard. She further testified that defendant told her he wanted a divorce and that this made her angry, that they quarreled for several hours and finally defendant struck her once while in the house and once again while in the yard. Roger Clark testified that he was a lawyer residing at Yorkville and that shortly after July 12, 1936, plaintiff consulted him about her marital difficulties and he observed that she had at that time a bruise and some swelling on one arm. Arthur G. Larsen testified that he was judge of the County Court of Kendall County and that plaintiff and her father came to see him some time after July 12th and that plaintiff showed him one of her arms and that he observed a bruise about half-way between the elbow and shoulder. George Harkness, the father of the plaintiff, testified that shortly after July 12th his daughter came home and showed him some black and blue bruises on both of her shoulders. Mrs. Zina Harkness, the mother of the plaintiff, testified that she also observed black and blue spots on both of the arms of her daughter shortly after the 12th of July,

and that at one time the defendant said to her that he had beaten plaintiff because she said his father was a drunkard. Russell Johnson testified that he was formerly employed at the Tribune Farm and worked for the defendant and that on July 12th, 1936, he and Paul Niles were walking toward the road near the home of the parties; that he was not close enough to hear what was being said by the plaintiff or defendant but when he turned his head toward them he saw defendant slap the plaintiff. Paul Niles testified that upon this occasion he was walking a little ahead of Johnson, that he observed the parties walking in their yard but did not see the defendant strike the plaintiff.

It appears from the record that the father of the defendant died on March 1, 1934, previous to the marriage of the parties hereto, and that the defendant had been previously married and divorced and that his former wife and child live at Hampshire, Illinois. The evidence is further that the defendant, after his father's death, looked after the business affairs of his mother and sister, and on July 12th, 1936, he asked his wife to go to Chicago with his mother and himself, but she refused and stated she wished to go to Aurora to get her hair waved. Defendant arrived home about the middle of the afternoon that day, and shortly thereafter the plaintiff came and a quarrel ensued. It was upon this occasion, according to the testimony of the defendant, that the plaintiff stated to defendant that his father was a hypocrite, a liar and a drunkard and when asked by defendant why she said that, she replied that she wanted to provoke the defendant so that he would take her home; that defendant replied that he would not take her home; ~~that defendant replied that he would not take her home;~~ that he had done that once with disastrous results and wouldn't do it again;

that plaintiff then said she would make him take her home and she then followed him into the cattle yard and into the barn, close up to his heels, stopped when he stopped, went forward when he went forward and when he climbed a fence, she did the same, and when she was not walking behind him, she walked at his side and imitated every step and mimicked everything he did. That he requested her to stop but she refused and insisted upon him taking her home. That she did this in the presence of members of his family and of workers on the farm. Arthur Wade and Charles Sleezer testified that during the afternoon of July 12th, 1936, they were driving along the road with a load of hay and observed that the plaintiff and defendant were quarreling; that the defendant stopped them and in the presence of the plaintiff said to them that the plaintiff had said that his father was a hypocrite, a drunkard and a liar and stated that inasmuch as they both knew his father, he wished they would state whether such was true. They both said it was not true and plaintiff then said she was glad to hear it, that she didn't know it herself but was only quoting what other people had told her. After Wade and Sleezer went on the quarrel continued and plaintiff kept insisting that defendant take her home and stated that she would so conduct herself that he would have to take her home. Defendant then went to the wind pump and as he had a glass of water in his hand, she hit the glass and splashed it over his face and grabbed him by the neck with both hands and it was then, according to the defendant, that he pushed her away, but did not strike her.

Arthur Wade and Charles Sleezer corroborated the testimony of the defendant as to the incident on the afternoon of July 12th, while they were driving along the road with a load of hay, and that they observed the conduct of the plaintiff on that afternoon and

that plaintiff followed the defendant in the cattle yard and barn and mimicked everything he did and that they heard the defendant ask her to stop and inquired of her what she wanted and she stated that she wanted defendant to take her home. Charles Sleezer also testified that he returned later, that the parties were still quarreling and that time plaintiff kept bumping into the defendant five or ten minutes, with her arms and shoulders, giving him "some pretty tough jolts". Louis Thurow, Jr., a brother of the defendant, testified that he was present on the afternoon of July 12th when plaintiff and defendant were together and that the defendant stated to him that the plaintiff was accusing his father of being a drunkard, a hypocrite and a liar and that plaintiff then stated that she was simply quoting what other people had said. This witness then advised the parties to forget it and plaintiff then said she was going to make defendant take her home and ran into him with her shoulders, emphasizing all her remarks with her shoulder and insisting that he take her home, and mimicking every step he took and motion he made. That at this time the plaintiff said that she wanted to be a Marion Zioncheck and that she liked publicity. The mother of the defendant testified, corroborating the other witnesses to the effect that she observed plaintiff mimicking the defendant and observed that she took a cup of water and splashed it in his face and that she saw plaintiff grab defendant with both hands, whereupon the witness inquired what it was all about and plaintiff stated that she wanted defendant to take her home.

The plaintiff admitted that she might have thrown water in defendant's face and that she might have grabbed him with both hands and did not deny that she had mimicked him as related by the several witnesses or that she had stated to him that his father was a drunkard.

that [illegible]

and [illegible]

[illegible]

[illegible]

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According to all the evidence, plaintiff remained at home with the defendant until the afternoon of the next day, when she went to her parents, leaving a note advising the defendant where she was. On August 4th, 1936, she returned home with the defendant and the parties got along very well for a while. On the evening of February 12th, 1937, she testified that they were arguing about a divorce and that while she was lying down he struck her about fifteen times on the legs, causing them to turn black and blue; that thereafter appellee remained quarrelsome and frequently swore at her and on one occasion told her that if she had any guts she would get a divorce and on the following day, May 10th, 1937, defendant said he was going to get a divorce from her and she left. The record discloses that on May 10th, plaintiff did return to her parents. This was on Mother's Day and the plaintiff and defendant had been invited to go and did go to the home of the mother of the defendant, where they had a light lunch about 4:30 in the afternoon and expected to go to a show as guests of defendant's mother that evening. Before doing so, however, they returned to their home. It was after they returned to their home that plaintiff told the defendant she was going to leave and packed some dishes and with her father and mother went to their home and the parties have not lived together since them. It further appears from the evidence that on June 10th defendant told the plaintiff on the street in Yorkville that he wished she would come home, and in reply she stated that if he would come to the court house on Saturday, they would determine whether there would be a divorce or separate maintenance and that he replied that he did not want either and she stated that she was going to Summer School at the University; that he called her over the 'phone on the following

Sunday and asked her if she had reconsidered and was going to come home and she stated that she was not and entered Summer School at Champaign the next day. On July 10th defendant went to Champaign, called at the house where plaintiff was staying, took her to lunch and dinner and they remained together until about nine o'clock that evening. In the course of their conversation about her returning home, plaintiff said she would not consider coming back home until they had some kind of a property settlement. They separated, defendant kissing her goodbye and returned to his home and shortly thereafter received a letter from the plaintiff in which she stated she was glad to have seen him the previous Saturday, referred again to a property settlement as the basis of her return and advised him she would be home on the following Saturday, where he could see her if he desired.

The foregoing is a fair resume of the evidence found in this record. Plaintiff concedes she had a good home and was amply provided for by defendant but insists she left him on May 10th because she was afraid of her life and her physical well being. It will be noted, however, that in her letter to the defendant after his visit to her while she was attending Summer School at Champaign there was no reference by her to ill treatment, cruelty or that she was afraid of the defendant or that she feared any physical violence. What she did refer to in this letter was a property settlement. At the conclusion of the hearing, the Chancellor stated that from the evidence it was apparent plaintiff was never in any apprehension of suffering great bodily harm or intolerable hardships, and he called attention to the fact that both the parties came from excellent families, that the plaintiff was an attractive, educated woman and defendant a highly successful

farmer, that he was not as gallant as he should have been and perhaps did not treat her with asmuch kindness, respect and delicacy as he should but that the plaintiff was not entirely blameless inasmuch as the uncontradicted evidence disclosed that she followed defendant wherever he went while they were quarreling on the afternoon of July 12, 1936, mimicked everything he did in the presence of the workmen and members of his family, made statements concerning the deceased father of the defendant which should never have been spoken and did other things so that it could not be said that defendant was not in some measure provoked, hurt and undoubtedly angered, and therefore, giving to plaintiff's testimony the most favorable construction possible, there was not sufficient proof upon which to base a decree. We concur in this conclusion.

There is no corroboration of plaintiff's testimony as to what she says occurred on February 12th, 1937, and the evidence is that the parties lived and cohabited together until the evening of May 10th, 1937, and it is not even claimed by plaintiff that the defendant ill-treated her that day or did anything that justified her in going to her parents' home. From all the evidence it is apparent that she had been considering for some time entering summer school at the University of Illinois. The law required the plaintiff to prove her charges of cruelty by a preponderance of the evidence. The chancellor who heard the witnesses testify and observed them while so testifying was of the opinion that the plaintiff had not so proven her case. The law is further that an Appellate Court will not disturb the findings or decree of the Chancellor unless the Appellate Court, upon a review of the entire

record, comes to the conclusion that the findings are against the manifest weight of the testimony. From what we have said it follows that the decree appealed from must be affirmed. It is therefore unnecessary for us to pass upon the motion to dismiss the appeal which was taken under advisement with the case.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On OCT 11 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9411 AGENDA NO. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1939.

FRANK H. GROVE, Appellant, vs. W. W. GRANT (now deceased, Sarah B. Grant, Executrix, substituted), J. A. Gaulrapp and W. F. Flock, trading under the firm name and style of Gaulrapp & Block, Appellees.	APPEAL FROM THE CIRCUIT COURT OF WHITESIDE COUNTY

DOVE, P. J.

On December 9, 1929, appellant Frank H. Grove filed his bill of complaint in the Circuit Court of Whiteside County, alleging that there was due him for labor and material furnished by him in the construction of a dwelling erected for W. W. Grant upon the premises of Grant described in the bill, the sum of $151.40, and in addition thereto the further sum of $276.12, all by virtue of the provisions of an oral contract entered into between the parties whereby Grant was to pay Grove not only the cost of material and labor furnished by Grove but also ten per cent on all labor and material furnished by Grant in and about the construction of said dwelling. The bill prayed that complainant be decreed to have a lien

upon the premises for said amounts aggregating $427.52 and in default of payment that the premises be sold under the direction of the Court. Grant answered denying that he entered into the oral contract as alleged in the bill but admitted that there was due complainant $23.45 which amount had been tendered to the complainant but who had refused to accept the same.

The cause was referred to the Master who took the evidence and reported his conclusions, which report the court, after overruling exceptions thereto, approved and rendered a decree as recommended by the Master and it is to review this decree that complainant below has perfected this appeal. Prior to the entry of the decree W. W. Grant died testate and his executrix was substituted as defendant.

The bill alleged that appellant was a builder and contractor and that on July 9, 1929, appellee applied to appellant to furnish material and labor to build a dwelling for him and that the parties entered into an oral contract by which appellee's testate agreed to pay appellant the cost of the material and labor which he furnished and in addition thereto ten per cent of all labor and material furnished by him. Appellant so testified. He further testified that in pursuance to that contract he hired Frank and Clarence Wolf to do the carpenter work and early in July entered upon the construction of the house and expended the first week the sum of $45.70, the second week $222.45, the third week $180.75, the fourth week $103.20, the fifth week $121.40 and the sixth week $87.95, which several amounts, together with ten per cent thereof, appellee's testate paid but after August 19th refused to pay any further sum.

Appellant further testified that on August 19, 20 and 21, Clarence and Frank Wolf and himself worked in and bout the construction of the house and that on August 22 he paid compensation insurance amounting to $53.00 and paid for telephone installation and rental and various other items, the aggregate amount of which from August 19 to August 22nd inclusive was $151.40. He further testified that the balance of his claim, amounting to $276.12, was ten percent (10%) of the cost of material and work paid for by appellee's testate, which included plastering, brick, brick work, lumber, mill work and carpenter work.

Appellee's testate testified that he was forty-nine years of age, a locomotive engineer, that he did not contract his work for the construction of his home as testified to by appellant but ascertained that appellant did concrete and cement work and employed him to put in the concrete foundation and cellar work, for which Grant was to pay him $5.00 per day. That appellant had two carpenters in his employ whom he paid sixty-five cents per hour and some common laborers whom he paid forty cents per hour; that Grant agreed to pay appellant in addition to these wages to these men whom appellant had regularly in his service ten per cent of their wages. He further testified that he, Grant, could hire anyone else he wished and that appellant was not to receive anything additional upon those he, Grant, hired. That the ten per cent of the wages of his own men was to take care of the compensation insurance and use of appellant's tools. That he never at any time agreed to pay him anything additional on any other labor or upon any materials that went into the construction of the house; that he, Grant, purchased the mill work from the Moses Dillon Company, hired Lee Little to do

the plastering, purchased the brick himself and hired John Linghem and son as brickmasons to lay them; that prior to August 19th he told appellant that he didn't need him or his men any longer on the job but that he and his men did do some work thereafter amounting to $23.45, and this amount was not paid because appellant never requested it. From all the evidence the Master found that there was due from Grant to appellant for work done and services rendered by him and by Frank and Clarence Wolf on August 12, 20 and 21 the sum of $44.90 and $3.00 in addition which Grant conceded, making a total of $47.90; that Grant was entitled to credits for overcharges amounting to $9.45, leaving a balance due appellant of $38.45 and it was for this amount that a decree was rendered in appellant's favor.

The versions of the contract as testified to by Grant and by appellant can not be reconciled. We have read their testimony and the other evidence found in the record. Lee Little did the plastering and appellant testified that he hired him. Little testified that appellant spoke to him about the job but that Grant hired him and paid him and that he started to plaster on September 25, 1929, and concluded on October 10th. It will be recalled that appellant did not work after August 21st. Clyde Owens testified that he did the electrical work and that Grant hired him and paid him. Owens and other witnesses testified that Grant told them that Grove had no contract for building the house but that Grove was doing it on a percentage basis. In Pasedach v. Auw, 364 Ill. 491, the Court said: "The evidence for the respective parties can not be reconciled. The master-in-Chancery saw the witnesses and heard

them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the Master's findings are entitled to due weight on review of the cause. (Keuper vs. Mette, 239 Ill. 586). His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence". So here the testimony of the parties as to the terms of the contract is conflicting and irreconcilable. The Master had the advantage of seeing and hearing the witnesses as they testified. His findings and the findings in the decree are supported by the evidence. No satisfactory reason appears why Grant would agree to pay appellant ten per cent of all material which went into the construction of the dwelling when the evidence is that Grant himself purchased it from the several dealers. Under the authorities and the evidence found in this record we would not be justified in reversing this decree and it will therefore be affirmed.

We might add that under the authority of Shaw v. Davis, 289 Ill. App. 447 and cases therein cited, this court need not entertain this appeal. The abstract is insufficient for failure to affirmatively show that appellant filed his notice of appeal in the trial court within the prescribed time after the decree herein was filed and approved. All the abstract shows is: "Notice of appeal". It does not show when or where it was filed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9440 AGENDA NO. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1939.

ED SIMPSON, Appellant, vs. WHITTAKER FARMERS GRAIN COMPANY, a Corporation, et al, Appellees.	APPEAL FROM THE CIRCUIT COURT OF KANKAKEE COUNTY.

DOVE, P. J.

This was a suit brought by appellant to recover from appellee, Whittaker Farmers Grain Company, the value of four hundred sixty-six bushels of Indian Corn at fifty-two cents per bushel, alleged by the plaintiff to have been sold and delivered by him on July 15, 1938, to the Grain Company, The answer of the defendant admitted the purchase by the defendant of the corn and the delivery thereof and that the same had not been paid for but alleged as an affirmative defense that the plaintiff was a tenant of Susie R. Salzman, that the corn was grown by the plaintiff on her lands during the term of his tenancy; that Susie Salzman was entitled to a share of said corn as rent; that no division thereof had been made and that Salzman claimed a lien upon said corn. By his reply the

plaintiff denied that Salzman had any lien for rent on the corn. A trial was had and the issue thus made was submitted to the court for determination, resulting in an order directing that Susie Salzman be made a party plaintiff and ordering the defendant to pay her $104.00 and ordering the defendant to pay the plaintiff 21.00 and each party to pay their own costs. To reverse this order the record is brought to this court for review by the plaintiff below, Ed. Simpson.

It is first insisted by appellees that there is no final judgment entered by the trial court and that therefore the appeal should be dismissed. The record discloses that December 20, 1938 was one of the regular days of the October Term, 1938 of the Circuit Court of Kankakee County and that on that day the hearing of this case by the Court was resumed, the evidence closed and it was by the court ordered that Susie Salzman be made a party plaintiff, that the defendant pay Susie Salzman $104.00 and pay Simpson $21.00 and Salzman and Simpson pay their own costs. Counsel for appellees insists that there is no finding by the court of the issues in favor of any of the parties and no apt language constituting a judgment. It is not necessary for the court to make a finding as to the issues but the record entry must show a judgment and this judgment order, while informal and not in technical language, we believe it does meet the tests required to determine its sufficiency in matters of form. In Coats v. Barrett, 49 Ill. App. 275, at page 278, the court quotes with approval the following language from Freeman on Judgments, Sec. 50:

> "That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it show,

> first, the relief granted and, second, that the grant was made by the court in whose records the entry was written. In specifying the relief granted, the parties of whom and for whom it is given, must, of course, be sufficiently identified. According to the Supreme Court of Alabama, "A judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the special thing or amount of money recovered'."

Upon the trial the plaintiff testified, without objection, that on July 15, 1938, he sold and delivered to the defendant four hundred sixty-six bushels of Indian Corn at fifty-two cents per bushel, amounting to $242.32; that defendant had paid him a part thereof, leaving a balance due him of $125.00. The plaintiff then rested.

The evidence offered on behalf of the Grain Company disclosed that the farm upon which appellant lived belonged to the City Trust and Savings Bank and in the Fall of 1937 was sold to Susie Salzman and she was to receive the cash rent and the landlord's share of the grain rent, which, so far as is here material, was one-half of the Indian Corn delivered at the elevator. Simpson paid the cash rent and husked the Indian Corn and cribbed it on the place. Louis Salzman, the husband of Susie Salzman, testified that Simpson notified him that he did not have crib room for all the corn and on Thanksgiving, 1937, Salzman got a truck load, which he measured and which he said was about one hundred twelve bushels. There was a double crib on the place spoken of in the record as the east crib and the west crib, both about the same size, and Simpson filled these cribs and according to Salzman threw about fifty bushels of corn in a stall in the barn. Simpson moved from the farm about March 1st, 1938. Before leaving he had shelled and sold at least one-half of the corn that was in the west crib. Salzman

and he were not in agreement as to how the corn should be divided, Simpson insisting that Salzman should take the corn in the east crib and that the corn in the west crib was his. In February an agreement was reached whereby Salzman was to take the corn that was in the north half of the west crib to offset the corn which had been in the south half of that crib and which Simpson had theretofore shelled and sold and the corn in the east crib was to be weighed and divided. The day following the making of this agreement, Simpson changed his mind and again insisted that Salzman should ~~he~~ take the east crib and the corn remaining in the west crib should be his and he so advised Salzman. In July, 1938, after he had left the farm, he returned, shelled the corn remaining in the west crib and sold it to the Grain Company and it was to recover of the Grain Company for the price of this corn that this suit was instituted. Salzman further testified that in addition to receiving all the corn in the west crib, Simpson hauled thirty-four bushels and thirty-six pounds of corn from the east crib to his home in October, 1938, when Salzman was shelling the corn in the east crib. Salzman was positive in his testimony that Simpson received fourteen hundred seventy-three bushels altogether and that he, Salzman, received twelve hundred ~~sixty~~ sixty-three bushels. Appellant was just as positive that he divided the corn equally at the time he husked it by wagon box measure and that he placed the landlord's share in the east crib and put his share in the west crib. Appellant further testified that he had noted in a book the exact amount of corn which was husked and cribbed in the east crib but that he did not remember the figures and did not produce the book.

From the consideration we have been able to give this ~~xxx~~ case, we believe that a fair conclusion to be drawn from all the testimony is that there was produced on this farm twenty-seven hundred thirty-six bushels of corn. Of this amount, appellant was entitled to one-half or thirteen hundred sixty-eight bushels. He sold, fed or kept, according to Mr. Salzman's testimony twelve hundred sixty-three bushels, leaving a balance of one hundred five bushels free from any lien of Susie . Salzman and judgment will be rendered in his favor in this court for $54.60.

The judgment order of the trial court will be reversed and judgment will be rendered in this court in favor of appellant and against Whittaker Farmers Grain Company for $54.60, the costs of this appeal to be taxed against the Grain Company.

JUDGMENT REVERSED AND JUDGMENT HERE

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, On Tuesday, the 3rd day of October, in the year of our Lord one thousand nine hundred and thirty-nine, within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice
Hon. BLAINE HUFFMAN, Justice
Hon. FRANKLIN R. DOVE, Justice
JUSTUS L. JOHNSON, Clerk
E. J. WELTER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1939 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

GEN. NO. 9456 AGENDA NO. 26

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1939.

HAZEL KRUM, Administratrix of the Estate of John Robert Krum, Deceased, Appellant, vs. MILES ROGERS, Appellee.	APPEAL FROM THE CIRCUIT COURT OF OGLE COUNTY.

DOVE, P. J.

On February 26th, 1938, appellant's intestate, John Robert Krum, received injuries by being struck by the automobile of appellee near the southwest corner of Division and Locust Streets in the City of Polo, Illinois. Subsequently this suit was instituted by the mother of said John Robert Krum, as the administratrix of his estate. The complaint consisted of four counts. The second count of which charged that the defendant negligently and carelessly drove his automobile while the windshield was covered with non-transparent material, in violation of paragraph 215 of Chapter 95½ of the Revised Statutes of this state. The answer of the defendant as to this charge alleged that defendant's automobile was equipped with an automatic wiper and that vision through the windshield was clear and unobstructed

and that it was free from any non-transparent material. The issues made by the pleadings were submitted to a jury, who found the defendant guilty and assessed the plaintiff's damages at $4,000.00. The trial court granted a new trial and to reverse that order plaintiff has appealed.

Upon the trial of the cause the Court admitted three photographs offered by the plaintiff and identified in the record as Plaintiff's Exhibits 5, 6 and 7. In granting appellee's motion for a new trial, the trial court stated that the admission of these three photographs in evidence was highly prejudicial to the rights of the defendant and for that reason the verdict of the jury was set aside and a new trial awarded.

These three exhibits have been certified to this court. We have examined them and are clearly of the opinion that under the evidence, defendant's objections thereto should have been sustained and therefore the trial court did not err in entering the order appealed from. The evidence discloses that these three photographs were taken by Fred A. Lindemann, who testified that he was a baker and had taken commercial pictures for twenty or thirty years, more or less. That exhibits 5, 6 and 7 are pictures of the windshield of the automobile of the defendant; that he used an Ikon high grade camera; that these pictures were taken at 2:00 o'clock in the afternoon of March 5th, 1938 in a garage owned by Charles Wolfe; that Exhibits 5 and 6 are pictures of the windshield of the automobile of the defendant and that when taken his camera was placed on the inside of the defendant's car at its back end and shows the inside condition of the windshield. That Exhibit 7 is a picture of the outside of the windshield and that the exhibits correctly represent the condition of the windshield at the time they were taken. The evidence further discloses that the

accident occurred about 6:45 P. M. on the evening of February 26, 1938. At some time later the automobile was taken to Wolfe's garage in Polo and placed there in a stall. Ralph Reed testified that he was the chief mechanic at Wolfe's garage, saw defendant's automobile in the garage on the morning after the accident and that he observed there was dirt and some mud spots on the windshield at that time and that the exhibits were correct photographic representations of the windshield as he saw it on February 27th. Lester Cupp testified that he was the night policeman for the City of Polo and that he went to the scene of the accident that night and saw defendant's automobile. He was shown the several photographs and he testified that these exhibits were correct representations of the windshield on the night of the accidnat "as near as I can figure", and that the foreign material on the windshield was dirt. This was all of the evidence with reference to the photographs at the conclusion of plaintiff's case. The Court reserved his ruling upon the admission of the photographs until after the conclusion of all of the evidence. On behalf of the defendant, Charles Wolfe, the owner of the garage, testified that he went to the scene of the accident three-quarters of an hour after it happened; that the car was taken to his garage and was parked in a stall and that cars so parked accumulate dust or dirt on the windshield; that he was present when the photographs were taken, was shown these photographs, and in answer to the question "Do these photographs represent the condition of the windshield at the time of the accident,", answered, "I am able to state no". On cross examination he testified that they were correct representations of the windshield when the pictures were taken. Fred Holbe testified that he was at the scene of the accident a couple of

hours afterwards and saw the defendant's car that night at Wolfe's garage. He was shown the several photographs and stated that the pictures make the windshield "look dirty. It looks dirtier on the picture than it did at the time I saw it", but that there was some mud and dirt on the windshield when he saw it. Elmer Davis testified that he was a truck driver, arrived at the scene of the accident an hour and a half thereafter, saw defendant's car in the garage, was shown the photographs and in answer to the question whether they were true representations of the windshield on the night of the accident answered "No, I wouldn't say it was. There is considerably more dust on them there".

The foregoing is a fair resume of all of the evidence concerning these photographs which is found in the record. Exhibits 5 and 6 are identical. They are prints from the same film or negative and in the foreground appears a small portion of the top of the front seat, most of the steering wheel, the instrument board, mirror, fan and other accessories. Nothing is discernible through the glass of the windshield. In Exhibit 7 appears a small portion of the hood and windshield, the camera evidently having been placed on top of the hood somewhere near the top of the radiator and looking directly at the front of the windshield and scarcely any part of the interior of the car is discernible. Photographs are properly received in evidence for the purpose of assisting a jury in understanding a case. In the instant case the trial court heard all of the evidence of the witnesses and the record discloses that he reluctantly admitted the photographs in evidence at the conclusion

of all of the testimony. Upon the hearing of the motion for a new trial, he came to the conclusion that these exhibits had a tendency to mislead rather than to assist, instruct or enlighten the jury to a correct determination of the issues submitted to them for a decision. Before photographs can be properly admitted in evidence, the proof must establish that they are true representations of the object photographed. The evidence in this record is that appellant's intestate was a boy thirteen years of age and was accompanying Vernon Toms, who was wheeling a wheelbarrow filled with junk. That the automobile of the defendant struck the wheelbarrow, demolished it and its contents were thrown over the front of defendant's car. The issue made by Count II of the complaint and the answer of the defendant is the visibility and condition of the windshield at and just prior to the time of the accident. There is absolutely no evidence as to its condition at that time. Perhaps no one knew its condition except the defendant and he was incompetent to testify concerning it. It will be recalled that this accident happened in the early evening of February 26th. Seven days elapsed from that time until the pictures were taken. Photographs to be of any assistance to the jury or of any value as evidence must be shown to have been taken at the time or when the situation and surroundings are unchanged.

From an examination of these photographs we are clearly of the opinion that their admission in evidence was highly prejudicial to the rights of the defendant and the trial court did not err in setting aside the verdict and awarding a new trial and this judgment will therefore be affirmed.

JUDGEMENT AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } SS.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

Reh. c. 2 denied Oct. 3, 1939

PUBLISHED IN ABSTRACT

Abstract

Taylorville Savings, Loan and Building Association, a Corporation, Plaintiff Appellant, v. W. B. McBride, et al, Defendant Appellees.

Appeal from Circuit Court, Christian County.

JANUARY TERM, A. D. 1939.

30 I.A. 632

Gen. No. 9,175 **Agenda No. 7**

MR. JUSTICE RIESS delivered the opinion of the Court.

Plaintiff Appellant, Taylorville Savings, Loan and Building Association, a corporation, appealed to the Supreme Court from a decree of the Circuit Court of Christian County in favor of defendant appellees, W. B. McBride and others, wherein the complaint was dismissed for want of equity at the costs of plaintiff. The cause has been certified to this Court for hearing on the ground that a freehold title to real estate was not involved.

Plaintiff appellant had foreclosed two mortgages on a certain lot and two story building situated in the city of Taylorville, Christian County, Illinois. where all of the parties then resided. The mortgages had been executed and delivered by defendants Rosa L. Schreider and Philip Schreider, her husband, to the plaintiff to secure payment of two promissory notes for $1500 each. The mortgaged premises were sold on July 31, 1936, by the Master in Chancery and were bid in by the plaintiff, who received a certificate of purchase subject to statutory right of redemption in the mortgagors and judgment creditors.

On October 25, 1937, a confessed judgment was entered in the Circuit Court of Christian County for the sum of $1320 in favor of defendant Evelyn Rogers and against Rosa L. Schreider and Philip Schreider, co-defendants herein, on their promissory note in the sum of $1200 dated October 21, 1937, which provided for a ten per cent attorney fee to be included in the judgment. Execution was issued on this judgment, and the amount of principal, interest and costs due plaintiff on his certificate of purchase in the sum of $3008.13 was tendered to the plaintiff and paid to the Master in Chancery for the purpose of redeeming the mort-

gaged premises, and the Master in Chancery thereupon on said date issued a certificate of redemption to Evelyn Rogers as such redeeming judgment creditor.

Thereafter, on October 28, 1937, defendants Rosa L. Schreider and Philip Schreider, her husband, executed a quit claim deed to the premises to defendant Alice Heaver. Plaintiff mortgagee refused to accept the amount due under their certificate of purchase and after October 31, 1937, when the fifteen months redemption period would have expired under the Statute (Pars. 18, 20, Ch. 77, Ill. Rev. Stat. 1937), the plaintiff tendered its certificate of purchase to the Master in Chancery and demanded execution and delivery of a Master's deed, which was refused on the ground that the property had been redeemed by a judgment creditor within the fifteen months redemption period. In the meantime, the premises had been advertised for sale by the Sheriff of Christian County under the execution which had been issued on the above confessed judgment.

Plaintiff thereupon filed its suit in chancery, alleging that the judgment of Evelyn Rogers was void for (a) want of consideration; (b) on account of variance between the date of the note, which read October 21, 1938, which erroneous date was subsequent to that of the judgment; (c) that defendants Rosa L. Schreider and Philip Schreider were not residents of Christian County but resided in Cook County, Illinois, at the time of execution and delivery of the note; (d) that the note was not signed nor executed in Christian County and that the judgment was, therefore, void; (e) that execution and delivery of the note was fraudulent and the result of conspiracy between the parties in an endeavor to defeat and defraud plaintiff of its rigts to the real estate and was insufficient to authorize the issuance of a certificate of redemption and resale of the property.

The complaint prayed for a writ of injunction restraining sale of the premises and that the judgment of Evelyn Rogers be declared void and of no effect; that the deed to defendant Alice Heaver and certificate of redemption issued by the Master to Evelyn Rogers be set aside and also prayed for a mandatory writ of injunction requiring the Master in Chancery to issue a deed to plaintiff on its certificate of purchase.

It appears from the evidence that the promissory note upon which the confessed judgment was entered

in the Circuit Court of Christian County was prepared and written in the office of defendant W. B. McBride, an attorney at Law in Taylorville, Christian County, and that said note on its face purports to be executed and made payable at Taylorville; that the note was taken to Chicago by defendant McBride and there signed by defendants Rosa L. Schreider and Philip Schreider, who had previously moved from Taylorville to Chicago, where they then resided; that said McBride testified that he was acting for and under the direction of the Schreiders, whom he represented as attorney in said transaction and pursuant to such direction delivered the same to the judgment creditor, Evelyn Rogers, who resided in Taylorville, in Christian County; that the said note was not fully executed until delivery and that such delivery was made in Christian County.

The language of the statute in relation to the Court wherein a judgment by confession may be taken (Chap. 110, par. 174 (5), Ill. Rev. Stat., 1937) reads in part as follows: "provided, however, that such application to confess judgment, whether made in term time or vacation, shall be made in the county in which the note or obligation was executed or in the county where one or more of the defendants reside. A judgment entered by any court in any county other than those herein specified shall have no force or validity, anything in the power to confess to the contrary notwithstanding."

We find that the note in question, which was signed by the Schreiders in Cook County was personally delivered by their attorney, McBride, to Evelyn Rogers in Christian County and that the place of execution of such note was in Christian County, where the confessed judgment was taken. In so finding and holding we have considered all of the correspondence and oral testimony of the parties together with surrounding facts and circumstances appearing in evidence and we hold that the finding of the Trial Court on that question was in accord with the greater weight of the evidence. The execution of the note or written contract was not consummated until it was delivered, which place of delivery was in Christian County. *Walker* v. *Lovitt*. 250 Ill. 543, 95 N. E. 631.

It is further contended by the plaintiff appellant that the judgment is void for want of consideration. Plaintiff, in its brief, says "We admit in this case that the

law is that if any part of the consideration for this note is bona fide, and admit that the execution of it after the twelve month period of redemption expired, that plaintiff in this case would have no rights in the matter." It appears from the evidence that defendant W. B. McBride, a practicing attorney and County Judge of Christian County, had received a telephone communication from a son of the Schreiders in Chicago to the effect that an offer of $50 had been made by one Lon Martin of Taylorville for a quit claim deed to the premises in question; that some years prior thereto, when the Schreiders were residing in Taylorville, McBride had acted in certain transactions as their attorney; that in this conversation he was requested to investigate and advise them of their rights and to learn if Martin would make a larger offer than $50; that he so investigated and wrote them in substance that their twelve months time for redemption had expired, but that a judgment creditor could still redeem; that a client of his would advance $200 and take care of his attorney fees in the matter if a redemption could be effected; that he went to Chicago at their request and the entire matter was discussed in detail; that in order for the property to be redeemed, it must be done by a judgment creditor; that a sister-in-law of his, defendant Alice Heaver, was willing to give $200 in cash and assume payment of his attorney fees and redeem the property; that as a matter of convenience, a judgment note could be taken in the name of Evelyn Rogers, a stenographer in the office of Judge McBride, and that an assignment of any rents and a quit claim deed could be executed to Mrs. Heaver in addition to the judgment note.

The arrangement to that effect was completed, and the judgment note in the sum of $1200 payable to the order of Evelyn Rogers was signed and the Schreiders instructed him to deliver the same; that $200 was paid to the Schreiders, $100 of which was by postal money order and $100 by personal check of McBride; that McBride returned to Taylorville and delivered the note to Evelyn Rogers by arrangement with Alice Heaver and placed the note in judgment, and subsequently the deed and assignment of any remaining rents in the hands of the receiver to Alice Heaver was made. The amount of the rents in the hands of the receiver had been only sufficient to pay certain accrued taxes and costs of mortgage proceedings. It appears that the actual bona fide consideration paid and advanced to the

Schreiders for which the note was given was $200 and the reasonable value of services performed by McBride as attorney for the Schreiders, the payment whereof was assumed by Mrs. Heaver in this transaction.

If any part of a note is given for a bona fide indebtedness, the payee may secure judgment and redeem from a foreclosure sale, and it is no concern to the purchaser at the foreclosure sale that the note is given for too large an amount, as that concerns only the maker and payee of the note. *Kerr* v. *Miller*, 259 Ill. 516, 102 N. E. 1050.

A creditor may redeem under a judgment secured on an indebtedness which was incurred after the debtor's twelve months period of redemption had expired, if such judgment is taken within the fifteen months period. *Kerr* v. *Miller, supra,* (p. 521).

Until the fifteen months redemption period has expired, the holder of the Master's certificate has no interest in the real estate, either legal or equitable. His only right is to receive the amount bid at the sale plus accrued interest and costs of suit prior to the expiration of the redemption period. *Zeman* v. *Ward*, 260 Ill. 93, 102 N. E. 1066; *Strauss* v. *Tuckhorn*, 200 Ill. 75, 65 N. E. 683.

The owner of the equity of redemption may lawfully confess a judgment for a bona fide consideration or indebtedness for the purpose of enabling a creditor to redeem. *Kufke* v. *Blume*, 304 Ill. 288, 136 N. E. 678; *Williams* v. *Williston*, 315 Ill. 178, 146 N. E. 143.

In finding that the payment of $200 and the assumption of the attorney fees constituted *pro tanto* a bona fide valuable consideration for the giving of the note in question, the Chancellor in the Court below was not holding against the greater weight of the evidence. When evidence is heard by the Chancellor, a reviewing court will not disturb his findings except when the record discloses that his finding was manifestly or palpably contrary to or against the weight of the evidence. *Hall* v. *Pittenger*, 365 Ill. 135, 6 N. E. (2d) 134; *Nokomis Nat. Bank* v. *Elmers*, 201 Ill. App. 242; *Kizer* v. *Moffett*, 164 Ill. App. 57; *Gannon* v. *Moles*, 209 Ill. 180, 70 N. E. 689; *Middleton* v. *Shanafelt*, 169 Ill. App. 52; *Ryerson* v. *Fairbanks;* 164 Ill. App. 62.

In giving the note and in confessing the judgment for a valuable consideration, although the notes and judgment were for a greater amount than the actual consideration that passed between the parties, it became a matter between the payor and payee, which could

not be collaterally attacked by the plaintiff under the proofs herein and did not render the judgment void. (*Kerr* v. *Miller, supra*, p. 530.) Having acted within their legal rights in the premises, the Chancellor properly found that the plaintiff had failed to show fraud on the part of the defendants that would entitle it to the relief prayed for in the bill. The alleged variance between the erroneous date of the note and the date of the subsequent judgment cannot be availed of by collateral attack, since that was a matter which might have been cured by amendment in the original proceedings and did not render the judgment void. Plaintiff is still entitled to receive from the Master in Chancery the amount due it and on deposit with the Master. *Strauss* v. *Tuckhorn, supra*, p. 83.

The decree rendered by the Chancellor of the lower Court, who filed a written opinion therewith, was in accord with the greater weight of the evidence and we find that no reversible error appears in the record. The decree dismissing plaintiff's suit for want of equity at the costs of plaintiff will therefore be affirmed.

Decree Affirmed.

(Seven pages on original opinion.)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

Gen. No. 7 FEBRUARY TERM, A.D. 1939. Agenda No. 11.

Louis Moroni,
Appellant,

vs.

Charles H. Albers,
Receiver of Citizens
State Bank of Creal
Springs, Illinois.
Appellee.

Appeal from Circuit
Court of Williamson
County, Illinois.

301 I.A. 633

Stone, P. J.

In this case appellee filed a motion to dismiss the appeal and as a basis urged that the notice of appeal specified an order entered May 2, 1938, that said order as shown by the record and transcript was not a final appealable order.

Thereupon appellant filed a motion for a diminution of the record by amending the record to show an order entered April 3, 1936 granting a change of venue from Judge Cook and another order entered January 24, 1938 granting a change of venue from Judge Rumsey both of which orders were entered on the motion of appellant.

Appellant also seeks to amend the record to show the order entered May 2, 1938. On May 2, 1938 the court sustained appellees motion to strike appellants amended complaint from the files for the reason that the same had been filed without first obtaining leave of court. The order entered sustained the motion and struck the amended complaint. In appellants motion for diminution of the record it does not appear that any action was taken other than to strike the amended complaint.

Section 74 of the Civil Practice Act provides that appeals may be taken to the Appellate or Supreme Court in cases where any form of review is allowed by law, to review the final judgment, order or decree of the courts therein specified. The striking of the amended complaint for failure to obtain leave of court to file is not a final appealable order. It does not adjudicate or settle any matter between the parties. When the court struck the amended complaint appellant had the right to ask leave of court to file the same and no doubt it would have been granted. A review of the order striking the amended complaint would only review the record as to whether leave of court to file had been granted before the pleading was filed. Appellant's motion does not even state that the amended record would show such to be a fact.

The diminution of the record as asked for in appellant's cross motion would still leave it subject to be dismissed on appellees motion to dismiss.

Appellant's motion for diminution of the record is denied and appellee's motion to dismiss the appeal is granted.

Appeal dismissed.

Abstract

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301

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